1898.

NEW ZEALAND.

THE HOROWHENUA BLOCK.

MINUTES OF PROCEEDINGS IN THE SUPREME COURT, AND JUDGMENTS ON THE SPECIAL CASE STATED BY THE NATIVE APPELLATE COURT (*Vide* G.-2, Sess. II., 1897, pp. 136–140).

[Transcript of Mr. Le Grove's shorthand notes.]

Presented to both Houses of the General Assembly by Command of His Excellency.

WEDNESDAY 3RD NOVEMBER, 1897.

BEFORE his Honour the Chief Justice, Mr. Justice Williams, Mr. Justice Denniston, and Mr. Justice Conolly.

Mr. H. D. Bell, with Mr. A. P. Buller, appeared for Major Kemp; Sir Robert Stout, with Mr. Stafford, appeared for Wirihana, one of the *cestuis que trustent* mentioned in the Act; and Mr. Baldwin for Rihipeti Nireaha, Himiona Kowhai, and Pire Tikara three of the registered owners.

The Court decided that Mr. Bell should open the case on behalf of Major Kemp.

Mr. H. D. Bell: May it please your Honours,—The Native Appellate Court, sitting not in their ordinary jurisdiction, but with special jurisdiction, as we submit, has submitted a case for the opinion of this Court, under the authority conferred upon it by the Act of 1894. In order to show how far the subject-matter submitted to the Court for its opinion is material, I submit it is necessary to turn to "The Horowhenua Block Act, 1896," and "The Native Equitable Owners Act, 1886," before the consideration of all the questions, and for this reason: If your Honours will look at question 15, you will see it says,—

"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?"

The first question, therefore, is whether a number of these questions are relevant. The Native Land Court puts that question in so many words to the Supreme Court. "The Horowhenua Block Act, 1896" (No. 18 of the local Acts), begins by a recital of "The Horowhenua Block Act, 1895." [Counsel here read the first four sections of "The Horowhenua Block Act, 1896."] If your Honours will look at the First Schedule, paragraph No. 5, you will see that Division 14 contains 1,196 acres. The point is this: that the Native Land Court have gone into the boundary question. What we say is that the Act contemplates inquiry into an existing area as defined for the purpose of ascertaining whether there are any *cestuis que trustent* as to that area, and that there is no authority to inquire whether that area was or was not properly ascertained. The reason why I refer to the First Schedule is because section 4 of the Act says, "as the said divisions are more particularly described in the First Schedule hereto"; and then the schedule says, "Division No. 14, containing 1,196 acres, more or less, being the whole of the land comprised in certificate of title, Vol. xlviii., folio 148, of the Register-book of the Wellington District," the usual way of describing land under the Land Transfer Act, just as if the description had been set out—that is, the area as defined on the existing division; and the question is as to whether there are *cestuis que trustent* as to that division. That is the whole matter as to section 4. Then, section 5 says,—

"Any order made in pursuance of proceedings under this Act declaring the persons beneficially entitled to the said Divisions Six, Eleven (in part), and Fourteen, or any of them, shall have the effect of vesting such land in the persons so declared respectively to be entitled for an estate of freehold in fee-simple as tenants in common in such relative shares or interests as are specified in, and as from the date of making any such order, anything in the Act now in force to the contrary notwithstanding; and such persons, and the successors of such of them as are deceased, shall, on the production of such order to the Registrar, be entitled to be registered as proprietors, and to have issued to them a Land Transfer certificate in respect of the land comprised therein; and any existing Land Transfer certificate, and all registrations of dealings thereon in respect of any such land, shall, subject to reregistration of dealings found not to be invalid as hereinafter provided, be deemed to be null and void as from the date of the passing of this Act."

Sections 6, 7, and 8 are not material, except subsection (*f*) of section 8:—

"A certificate of title for any portion of Division Fourteen aforesaid of which any valid alienation in fee-simple had been made as aforesaid, in the name of the person or persons entitled by virtue

of such alienation: Provided that no certificate of title as last mentioned shall be issued except pursuant to final judgment in the proceedings hereinafter directed to be instituted by the Public Trustee."

Then, section 10 is inserted for the purpose of testing the validity of the alienation, and the Public Trustee is directed to commence an action in the Supreme Court. That was done. Section 15 is the next important section. It reads:—

"For the purpose of carrying out the provisions of this Act, the Court shall have and may exercise, as the nature of the case requires, in addition to the special powers hereby conferred, all the powers and jurisdiction of the Court under 'The Native Land Court Act, 1894,' and 'The Native Land Laws Amendment Act, 1895.'"

I ask your Honours' attention to the opening words of the section—"For the purpose of carrying out the provisions of this Act." Now, your Honours, our submission is this: that "The Horowhenua Block Act, 1896," provides—(1) A re-enactment of the Equitable Owners Act; (2) power to the Appellate Court to exercise the jurisdiction conferred on the Native Land Court by the Equitable Owners Act; (3) gives to the Appellate Court, for the purpose of exercising that jurisdiction, its ordinary powers when it sits as in its ordinary jurisdiction, but only for the purpose of carrying out the provisions of this Act. The Appellate Court has assumed an original jurisdiction in respect to this block, and insists upon it. I may just say that a further power is given by this statute, which is not material to the present case.

The Chief Justice: You have not stated what your general object is—to establish what point.

Mr. Bell: I said I was dealing with section 15.

The Chief Justice: But what is the point you want to establish with regard to the construction of those sections?

Mr. Bell: This, your Honour—I must turn to the Equitable Owners Act before I can make my point clear: the point is that the Native Appellate Court had no jurisdiction to inquire into anything further than whether there was an intended trust with regard to a specified area.

The Chief Justice: Is not that stated?

Mr. Bell: No; they assert the right of the Appellate Court to go into and inquire into the whole proceedings of the Court of 1886. There are a number of questions which Sir Robert Stout, when acting with me, called "conundrums."

The Chief Justice: But do they not say that they are able to go into these matters for the purpose of establishing an existing trust?

Mr. Bell: That is exactly what they will not do. That is the attitude we have taken up throughout. We insist on an answer to question 15 [read]. We claim the answer "No" to that, and it is upon that that the whole point turns whether this Court will or will not require to answer a number of the questions.

Mr. Justice Denniston: There was a question as to the original boundary of this block?

Mr. Bell: Yes, your Honour. They say that is not the piece of land, but that there is another piece of land.

The Chief Justice: Is this the point: that the Appellate Court say, for the purpose of determining the question of a trust, the Native Land Court has not gone into the question as to whether any part of this Block 14 should have been located in the 11,000-acre block?

Mr. Bell: Yes, that is one of the blocks. The point, briefly stated, is this: "The Native Equitable Owners Act, 1886," provides that, upon the application of any Native claiming to be beneficially interested in any land as aforesaid, the Native Land Court of New Zealand may make inquiry into the title of such land, and in the existence of any trust affecting the title thereto. Our point is that the Native Appellate Court is limited to the ascertaining of an intended trust. The Appellate Court, under the Horowhenua Block Act, has only the jurisdiction conferred upon it by the Equitable Owners Act for this purpose, and that jurisdiction is only to inquire into whether there was an intended trust in respect to the block described in a particular instrument of title. I do not know, your Honours, if I have made the point clear.

Mr. Justice Denniston: You say that only an intended trust can be dealt with?

Mr. Bell: Yes, your Honour; it says so.

Mr. Justice Denniston: Section 3 of the Act goes on to say, "According to the result of such inquiry, the Court may declare that no such trust exists, or if it finds that any such trust does or was intended to exist, then it may declare who are the persons beneficially entitled."

Mr. Bell: It may inquire whether a trust does exist, of course, if there is no trust existing on the face of the instrument; but it has only jurisdiction to inquire into the existence of any intended trust.

Mr. Justice Denniston: I thought section 3 rather suggested that if there was a trust created, or an intended trust—a trust which was not declared——

Mr. Bell: Two things are provided by section 2. The nature of the title may be such that a trust does exist, or it may be proved as a fact that there was an intended trust in respect of it.

The Chief Justice: It might be that there was a trust sufficiently declared, or it might be that there was a trust insufficiently or indefinitely declared.

Mr. Bell: But consider what it would mean, supposing the Court were to proceed on the assumption that the Horowhenua Block Act declares that the Appellate Court shall have all the jurisdiction of the Act of 1894, and the Court were to determine that an accident of procedure is sufficient to clothe persons, without intention, with beneficial ownership: what is the obvious and necessary result of such a decision as that? We ask the Court to construe the Equitable Owners Act. We ask it not to consider accidental matters. That is what, we submit, is the meaning of the Equitable Owners Act; and we submit that the interpretation which our friends are driven to put on the Equitable Owners Act would be a dangerous one. The Appellate Court say that under section 15 of the Horowhenua Block Act they have original jurisdiction to inquire into what ought to have been done, and to themselves determine not a question founded on the pro-

ceedings of 1886, but an original jurisdiction to inquire, because they suggest in their question that they have original jurisdiction to investigate mere procedure while exercising jurisdiction under the Act. The Appellate Court has no original jurisdiction. Sitting as an Appellate Court, there is conferred upon it all the jurisdiction of the Native Land Court; but it cannot sit originally, except under the terms of the Horowhenua Block Act. It professes to sit under the Horowhenua Block Act, and professes to have an original power of ascertaining. The proceedings of 1886 were to ascertain by the Native Land Court Act the quantum of the interests.

Mr. Justice Denniston: You say that section 15 has been read too largely by the Appellate Court: it ought to be limited as in section 10. I hope these are not their questions.

Mr. Bell: Yes, they are; and we protest against every one of them. The President of the Appellate Court took a very strong view of its jurisdiction. He was asked to submit a question to this Court, and possibly has put it from his own point of view; but no doubt questions are so put that they are sometimes difficult to answer. I wish to show the Court that there was a special jurisdiction in the Appellate Court to do that which, and no more than that which is permitted to a Court under the Equitable Owners Act. And, turning to the Equitable Owners Act, I ask the Court to determine that what this Court has inquired into is entirely outside of the powers conferred upon them by the Equitable Owners Act.

The Chief Justice: Do you admit that this is a proper subject for inquiry—whether this block was or was not intended by the Native Land Court to be for Kemp beneficially, or for Kemp as a trustee?

Mr. Bell: That is what we say is the question, and the only question.

The Chief Justice: Not as to the procedure of the Court in arriving at that determination, but what its intention was—whether by reason of the change of the allotment from Ohau to the lake—which one side says was a blunder or an oversight, and that they never did allot this beneficially to Kemp, whereas you say they did allot it beneficially to Kemp.

Mr. Bell: That is what we say is the only question. I submit the question, under the Equitable Owners Act, is whether the Native Land Court has issued a certificate to a man in his own name which it intended should issue for the benefit of others. I will admit, however, that this is open—that supposing the Natives had all agreed amongst themselves that a certificate should issue to A, and the Judge had no intention in the matter, but issued the order in accordance with the common request, and it was then proved that the intention of the Natives who approached the Court and got it to do that administrative act was that it should be a trust instrument, I am not prepared to deny that that would be within the Equitable Owners Act. Supposing the Judge had been unable to give any evidence at all, and supposing that it had been proved that Block 11 was intended to be, not for Warena Hunia and Kemp, but for the other owners, I am prepared to admit that would be a matter the Court could inquire into under the Equitable Owners Act. But I do submit that the question under the Equitable Owners Act was whether the block of land was intended to be issued to the persons named therein, or was intended to be issued beneficially. The preamble of the Equitable Owners Act says,—

"Whereas under 'The Native Lands Act, 1865,' certificates of title to, and Crown grants of, certain lands were made in favour of or to Natives nominally as absolute owners: And whereas in many cases such Natives are only entitled and were only intended to be clothed with title as trustees for themselves and others, members of their tribe or hapu or otherwise: Be it therefore enacted," &c.

We may be wrong in that contention, but that is the contention we have submitted. The intention of the Legislature, as expressed in the Horowhenua Block Act, is, we submit, simply to clothe the Appellate Court with the jurisdiction granted by the Equitable Owners Act, and any further jurisdiction it might require for the purpose, such as stating this very case for the opinion of the Supreme Court. We submit the Court may then put on one side the Horowhenua Block Act, and look to the Equitable Owners Act, and then say whether the Appellate Court has been concerning itself in matters which have nothing to do with this matter.

The Chief Justice: Supposing it was said it was simply a Native Appellate Court of inquiry, to find out any little blunders of the Native Land Court. The Legislature hardly intended that.

Mr. Bell: Let me give one instance, and it is an illustrative one. Question 5 asks, "Was it not a condition precedent to the exercise of jurisdiction by the Native Land Court in 1886 that the original certificate of title issued under the 17th section of 'The Native Land Act, 1867,' to Meiha Keepa te Rangihiwinui should be surrendered, or an order made for its cancellation?" Now, the Division Act begins by dealing with Crown grants, which are records of the Lands Department. Its provision for division under section 17 is similar, *mutatis mutandis*, in order to get rid of the record, which is equivalent to *scire facias*. It requires that a certain thing must be done by the Minister of Lands, and the grant of land must be surrendered and cancelled before the Land Court proceeds, and it refers to the course to be taken by the Lands Department. We submit, if driven to this question, that it is manifest that it has no relation to any equity; it is a technical legal provision.

But is it not comic to suppose the Legislature intended the Court, in dealing with this question, to ascertain whether a Judge, before he proceeded to make his inquiry under the Act of 1886, did or did not formally cancel all the certificates. "If not," they say, "is not the whole thing open to us?" The learned Judges of the Appellate Court, having discovered this and a series of other flaws in the proceedings of 1886, considered this matter relevant to the inquiry whether the persons to whom the orders were issued were or were not intended by the Court to be beneficially entitled. We submit to the Court with all confidence that that is not the intention of the Equitable Owners Act, and we ask the Court to approach this case with that in view. We approach this case with an argument founded on that, and therefore propose to deal very lightly with the several questions stated by the Native Appellate Court, which, I suggest, might be very useful to them, and might be material to this Court, where it was considering *certiorari*, but have nothing to do with persons under a beneficial ownership whose rights are affected.

Sir R. Stout: I might point out that this is exactly in the teeth of what Kemp's counsel contended in the Court below.

Mr. Bell: I was Kemp's counsel in the Court below.

Sir R. Stout: I am referring to Sir Walter Buller's argument.

Mr. Bell: Sir Walter Buller was the agent for Kemp, but I was appearing for Kemp. I only appeared for one day, and I am presenting to this Court what I presented then. They at first refused to state their case at all, because I expressed the opinion that the questions were all irrelevant except one or two, with which I propose to deal. There is no doubt that the Court treated us, as this Court has treated us, with consideration, and they finally agreed to put Question 15. They consented to the Court determining whether, in fact, their jurisdiction is not confined to the one question under the Equitable Owners Act. Now I turn to the question which we submit is the only question they had to deal with, and shall submit to the Court the answers we contend for as the answers in this special case. The Court is aware of this fact, viz.: that the Horowhenua Block itself contains 52,000 acres. It was subdivided in 1886, and every question which is stated, and which I have been putting before the Court, applies not only to Block 14, but also to every other subdivision of the Horowhenua Block. The Appellate Court says the Legislature has not cancelled the certificates of title in these particular blocks for the purpose only of this Act, and therefore this land is put back to the certificate of 1867, and consequently what we have to do is to ascertain whether the Court properly ascertained the owners in 1886. That is what the Appellate Court says. They admit that if the Court of 1886 proceeded regularly, then they would have proceeded to ascertain what the intention was; but that if the Court of 1886 did not inquire into every one of the provisions of the Act, then they did not proceed regularly. The Appellate Court, after hearing counsel, does not give counsel so much information as the Judges of the Supreme Court do. They say,—

"They proceeded to subdivide the aforesaid block by giving effect to an alleged voluntary arrangement of the registered owners assembled at Palmerston North by virtue of section 56 of 'The Native Land Court Act, 1880'; but such arrangement was not reduced into form, or put into writing" (it is not required by the Act of 1880 that it should). "It was not formally recorded by the Court in manner provided, or recorded at all otherwise than by the Court recording the orders it made giving effect to the said arrangement, the Judge being of opinion that he had no power to depart from the terms of the alleged voluntary arrangement in any respect whatsoever, or to exercise any judicial discretion as to giving effect to it or otherwise, and that he could only act administratively and in accordance with such opinions. The said Judge did purport merely to act administratively, and merely to record the terms of such alleged voluntary arrangement. A large number of the registered owners of the said block were also dead or absent at the time the said voluntary arrangement was made."

Now, the point that the Native Land Court refers to here is that the Natives met at Palmerston, came to an arrangement by themselves, and a number of the registered owners were dead or absent at the time, but all had notice. The proceedings were *in rem*, and the question is, then, whether such a matter is, as suggested, material to this case. It is a question whether, unless every man is there, anything in the nature of a voluntary arrangement can be made. We submit that question cannot arise, and for this reason: that, notwithstanding the form in which they put the question on this point—I refer to the last words in question 2—the Court, in the way it has stated the case, demonstrates that, in respect of the allotment of Block 14, the Judge did not act administratively, but acted judicially. They find this: that the Court sat on the 25th November first, and that they dealt with three blocks, one of which was No. 3; and they found subsequently that No. 3 was No. 14; that No. 3 was intended for the descendants of Te Whatanui, who were not certificated owners of the block, but mentioned in the documents set out [see Exhibit 6]—that is, the agreement made in 1874, twelve years before the Court sat. On the 25th November the Native Land Court, sitting with an Assessor named Mangakahia, dealt with the three blocks, one of which was called then No. 3, and which the Appellate Court now finds was subsequently Block 14, and awarded that to Kemp for the descendants of Te Whatanui, to enable the arrangement between Sir Donald McLean and Kemp to be carried out. It is indisputable, and therefore common ground, that on the 25th November Kemp was trustee of Block 14 for the descendants of Te Whatanui, and in pursuance of a voluntary arrangement. The intention of the Court, and of everybody else, is clear on the 25th November; there is no question about it at all. The Court finds that Kemp was a trustee for the purpose of the descendants of Te Whatanui. Then, this happens: The descendants of Te Whatanui object; the piece of land is not where they intended it to be. The Assessor becomes ill, and a new Court is constituted before the same Judge and a new Assessor (Kahui Kararehe), and "called over for the purpose of confirming them—the three orders made on the 25th November—the presiding Judge being under the impression, as the application was for a partition of the whole block, that it was necessary to commence *de novo* in consequence of the continuation of the proceedings being carried on with a new Assessor. The proceedings of the 25th November were therefore apparently treated on the 1st December as being of no avail"—I do not know exactly what that means—"but this view was not subsequently adhered to, as three of the orders of the Court were finally dated from the 25th November, and as of a Court constituted by Judge Wilson and Mangakahia as Assessor, although the parcel of land No. 9 (the subject of one of the orders so dated) was not dealt with or before the Native Land Court on that date. The Court on the 1st December confirmed two out of three of the orders previously made on the 25th November—viz., the order for the railway-line, and the order for the parcel comprising 4,000 acres to be sold to the Government—but postponed the confirmation of the order for the 1,200 acres on the southern side of the block at Ohau, intended for the descendants of Te Whatanui, in consequence of a fresh arrangement entered into out of Court during the interval that a similar area should be set apart in another locality for the same purpose. Accordingly, in pursuance of the said arrangement, and in conformity with the terms of the agreement between Sir

Donald McLean and Major Kemp—that the 1,200 acres to be set apart for the descendants of Te Whatanui should be near the Horowhenua Lake (a circumstance that was not known on the 25th November when the first parcel of 1,200 acres was set apart for that purpose at Ohau)—a parcel of land comprising 1,200 acres was set apart at a place called Raumatangi, adjacent to the Horowhenua Lake, and numbered 9, and accepted by the descendants of Te Whatanui, who were present at Palmerston North at the Court of 1886."

The second stage of the proceedings is this: On the 25th November Block 14 was ordered to be given to Kemp for the descendants of Te Whatanui. In the interval the descendants of Te Whatanui reject the block, and the Court finds that it is not in accordance with the agreement. On the 1st December they allot Block 9—a block of similar area—for the descendants of Te Whatanui. My friend says that the words at the end of paragraph 9 do not mean accepted by the "descendants of Te Whatanui," but only by those who were present. At all events, they were not the registered owners, and had no say in the matter. The registered owners said they would give the block near the lake. On the 1st December the Court allotted No. 9 to Kemp for the descendants of Te Whatanui, and again it is common ground that Kemp became the trustee for the descendants of Te Whatanui in Block 9, 1,200 acres, on the 1st December. Now, your Honours will observe that the Appellate Court find also that on the 1st December the Court refrained from confirming the order made on the 25th November in respect to Block 14, for the reason that the agreement was not fulfilled. That left Block 14 vacant. It has been suggested by the other side that there was a selection still to be made by the descendants of Te Whatanui, who were not there, between these two blocks. The Court says that the descendants of Te Whatanui accepted Block 9, and thereupon Block 14 became vacant without an owner, and its ownership had to be determined by the Court on subdivision; and I want to show this Court what the Court then proceeded to do. They proceeded on the 1st December under a voluntary arrangement, and dealt with the other blocks of land. And now we come to the statement in paragraph 13:—

"After providing for an allotment to all the persons in the title there remained the portion of the said block, comprising 1,200 acres, at Ohau, dealt with on the 25th November as No. 3, but which became No. 14 later on, in consequence of the original number having been appropriated for another division; and this parcel, it is alleged, was ordered on the 3rd December, 1886, in favour of Meiha Keepa te Rangihiwinui, for himself only, as his share of the subdivisional scheme of partition under the alleged voluntary arrangement."

Now we come to the entry in the minute-book on which this claim is based:—

"Application from Meiha Keepa te Rangihiwinui for confirmation of that order for 1,200 acres in his own name, as shown upon the tracing before Court. Objectors challenged. None appeared. The order is made, as prayed, Te Keepa te Rangihiwinui."

I would point out to your Honours that the trust for the descendants of Te Whatanui had been fulfilled by the allotment of Block 9.

Mr. Justice Williams: Have the descendants of Te Whatanui kept Block 9 ever since?

Mr. Baldwin: Not until the year 1889.

Mr. Bell: The question is as to what was done on the 3rd December. There is no doubt about that. What is suggested by some ingenious people is that, inasmuch as all the descendants of Te Whatanui who lived in Te Rauparaha's time were very numerous, the land was too small for them; but the Appellate Court has referred to that as a contention and nothing else. On the 1st December No. 9 is allotted to the descendants of Te Whatanui because they rejected Block 14, and said they would not have it all because it was not near the lake; the Court awarded Block 9, and refrained from doing anything with regard to Block 14; and then on the 3rd December proceeded to issue an order for Block 14; and the question is whether the Court, on the 3rd December, did or did not intend a trust. The case states:—

"It is contended on behalf of the persons who assert that Meiha Keepa is only a trustee for Subdivision 14 that the foregoing minute supports their contention that the order made on the 3rd December is merely a confirmatory one of the order for the same parcel of land, the order for which was pronounced and entered on record on the 25th November as No. 3, and then vested in Meiha Keepa te Rangihiwinui for the descendants of Te Whatanui, in fulfilment of the arrangement between himself and Sir Donald McLean, as neither the position, the area, nor the purpose had been altered on the 3rd December, although the number had then been changed from 3 to 14. It is further urged that this section was set apart as an alternative one."

I point out to the Court that the first suggestion on the other side is ludicrous, unless the area to be given to the descendants of Te Whatanui was to be doubled. If the order of the 25th November was confirmed on the 3rd December, then it simply confirmed a trust which the descendants of Te Whatanui had deliberately rejected. Then it goes on:—

"Judge Wilson, in contravention of this contention, avers that the parcel of land before the Court on the 25th November was Subdivision 9, and not Subdivision 3, and that the last-named subdivision was always known to him as Subdivision No. 14, and was set apart for Meiha Keepa only. His explanation of the entry in the minute-book on the 3rd December—viz., 'Application from Meiha Keepa te Rangihiwinui for confirmation of that order,'—is that the clerk probably obtained the term 'confirmation' through the interpreter in translating the word 'whakatuturu,' which was possibly used by Meiha Keepa in applying for the order for Section 14 in his own name, which it is alleged he had already applied for the previous day. The Judge stated that he had hesitated to make the order, as he considered it advisable, owing to Meiha Keepa having already had in the subdivision a section comprising 800 acres allotted him for the payment of his tribal debts at Wanganui, and adjourned the application in order that the persons interested in the apportionment of the Horowhenua Block should have an opportunity of considering whether Meiha Keepa's request in respect of Section 14, comprising 1,200 acres, being allotted to himself should be complied with."

This is the evidence which, I submit, is the evidence that in this respect Judge Wilson did not appear to act merely administratively:—

"The Court is of opinion that Judge Wilson is under a misapprehension as to the order in which the subdivisions were made, as it is sufficiently manifest from the minutes of the Court of the 25th November, coupled with other circumstances, that Subdivision 3, afterwards numbered 14, was the parcel of land before the Court on the 25th November, and not No. 9, which only came before the Court for the first time on the afternoon of the 1st December. As regards that part of Judge Wilson's explanation concerning the application made by Meiha Keepa on the 2nd December to have No. 14 allotted to him for himself, there is no entry in the minute-book in support of the circumstance, but this is not conclusive proof that no such application was made. The Court, however, makes no definite finding on the point as to whether No. 14 was at the Court of 1886 awarded to Meiha Keepa beneficially, as it is not necessary for this case to determine it. But they do ask in question 14A whether, where the evidence is conflicting and depends entirely on oral testimony, it is 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."

Of course, we ask the Court to proceed on legal principles here. We submit it is established that the very thing which happened here is the very thing the higher Courts refuse to allow: the Judge might be right or wrong, but his answer is final unless it contravenes the record. We show that on authority and principle. We submit there is direct authority, and it is consonant with principle. The Judge has been put into the box, cross-examined, and apparently his recollection is discredited; and the question is whether that can be allowed. We admit that this Court has on one occasion said it might be; but we say that the Court had not the authority before it, and we ask this Court to overrule that decision. What we say is that what is not allowed in the Supreme Court should not be allowed in the Native Land Court, and that if the Judge says his recollection is clear, then there is an end of the matter. The application was made on the 3rd December. The minute made is of the 3rd, and there is another application on the 2nd. They say there is no minute of the 2nd December, but the absence of the minute is not conclusive. On the 3rd December there is no doubt that the application is made, and Judge Wilson says positively that he did dispose of the block for Kemp himself absolutely, and not for others. They suggested that the Court had dealt with this on the 25th November, and was *functus officio*. The Court was dealing with partition under its jurisdiction, and it proceeded to make its oral decision.

Sir R. Stout: It is a new Court.

Mr. Bell: Then, a new Court had no right to award Block 9. It is almost impossible to conceive of a partition Court proceeding without completing its work. Block 14 was intended on the first day to go to A, and the trust failed, and it remained to be dealt with on the 3rd December; and dealt with it was; and we submit there was a clear jurisdiction to deal with it on the 3rd December.

Mr. Justice Denniston: Was confirmation necessary?

Mr. Bell: It is explained. The Judge says that Kemp used the word "whakatuturu." The order had been already made to Kemp.

Mr. Justice Denniston: Confirmation was not necessary, except on the theory that it was another Court?

Mr. Bell: Yes; and they went back and dated the orders 25th November. They got a new Assessor, and the question of whether it was a new Court was considered, and they proceeded afresh, and did not call up the order in relation to Block 14.

Mr. Justice Denniston: You say that it was the same order, and that the only difference was that it was a question of trust?

Mr. Bell: Yes; we say that is a reasonable view. Their first suggestion, as I have said, is ludicrous: that Kemp asked for a confirmation of the original order for Block 14. It is manifestly absurd, because on the 3rd December the descendants of Te Whatanui had got Block 9. There is a question as to the meaning of the word "whakatuturu," which is to be explained by recollection of the circumstances *aliunde*. The word "confirmation" is there, and the minute says "confirmation." Judge Wilson's evidence is called *aliunde*, to explain the meaning of the word, and that is conclusive. The Court says,—

"His explanation of the entry in the minute-book on the 3rd December—viz., 'Application from Meiha Keepa te Rangihiwinui for confirmation of that order'—is that the clerk probably obtained the term 'confirmation' through the interpreter in translating the word 'whakatuturu,' which was possibly used by Meiha Keepa in applying for an order for Section 14 in his own name, which it is alleged he had already applied for on the previous day."

Sir R. Stout: My point is that Judge Wilson did not say the word was used.

Mr. Bell: The word "confirmation" was used, and evidence is to be obtained of the meaning and intention of that, *aliunde*. It was the only question the Court had to ascertain—whether the order was an order to Kemp himself, or an order to Kemp as trustee; and this question—whether by an accident there is a trust by reason of some invalidity in the proceedings or some defect in the order—is not the question submitted to the Court in terms of the Equitable Owners Act. We submit that the Judge's recollection is exclusive; we do not suggest that a Judge's statement is to be accepted against the record. We admit that it cannot, though it is competent for a Court to amend its record in consequence of the Judge's view that its record is erroneous. The record can be amended by the recollection of the Judge, but the recollection of the Judge is not conclusive against the record. The line of authority on this point begins with a case in Croke's "Reports, Charles I.," page 338. I submit this point is of very great importance, whether a Judge who is quite clear upon the point can be contradicted and cross-examined and dealt with in this way. It is a question of principle, and of very great importance.

The Chief Justice: What is the meaning of the last sentence in paragraph 13?

Mr. Bell: They state that because they think it is a resulting trust. They assume that it is not their function to ascertain whether it was awarded beneficially to Kemp or not. They say by some

of these errors Kemp became by operation of law a trustee. If this Court is of opinion that their function is to determine whether he was or was not intended to be beneficially interested, they will answer accordingly; but they are asking this Court whether Kemp became a trustee by the operation of law on the facts here indicated. We say that the questions they have put are all irrelevant, except those relating to Judge Wilson.

The Chief Justice: The meaning of the last passage in paragraph 13 is that the Native Appellate Court makes no definite finding as to whether Block 14 was intended to be awarded.

Mr. Bell: That is the point. They do not find, and that is the point we are asking the Court to tell them was the only point for them to deal with. The reason they did not answer is because the Court might say, "You have answered that, and all this other matter is irrelevant," and therefore they do not give any finding on it.

The Chief Justice: They say, "In order to ascertain that, we should have to consider certain matter."

Mr. Bell: That might be so. I shall submit that the real meaning of it is, "We want to know whether we cannot deal with it in an entirely different way." There is authority in the case of Eliot *v.* Skypp (Croke's Cases, page 338). Then there is the case of King *v.* Grant (5 Barnwell and Adolphus, page 108), also reported in 3 Neville and Manning, page 105; and the case of Everett and Youlls (4 Barnwell and Adolphus, page 431), also reported in 1 Neville and Manning, page 531.

The Chief Justice: You wish to establish the position that Judge Wilson's evidence is conclusive?

Mr. Bell: Yes, your Honour, and exclusive.

Sir R. Stout: He cannot be cross-examined, according to my friend.

Mr. Bell: Yes, that is exactly the position. In the case of Everett *v.* Youlls it was stated that the Judge had said something, and it was sought to bring in the affidavits of others to show that the Judge had not said what was alleged. These cases are conclusive in my favour. The case of King *v.* Grant was on a motion for a new trial, and the question was whether certain evidence was brought forward for a certain purpose. Supposing the question arose as to whether certain evidence was raised at a trial, and counsel A says it was, while counsel B says it was not, and the Judge on looking at his notes says, "I am perfectly clear that it was," then counsel B wants an affidavit to contradict what the Judge says. Lord Dennan's ruling says that you shall not put in such an affidavit—not that the Judge's evidence shall merely have paramount weight, but that it shall be conclusive. (See also Russell against Moore, 8 Irish Law Reports, page 332.) Then there is the case your Honours had before, in which the point was not exactly raised, but referred to the recollection of the Judge—in Hapuku *v.* Smith (12 N.Z. Law Reports, page 155).

The Chief Justice: Was the point on prohibition?

Mr. Bell: Yes, your Honour.

The Chief Justice: I do not see that prohibition is conclusive. The regular practice is to receive affidavits of what took place.

Mr. Bell: Yes, as to what took place, but not as to what the Court said itself. The Court writes certain words, and says, "We wrote it under certain circumstances, and it means so-and-so." Could anything be said to contravene that? We submit that no circumstance but the record is admissible against the statement of the Judge. There is also the case of the Secondary of London in the case of Coles *v.* Dulman (17 L.J. C.P. 302), and it is the only case I can find showing that what applies in a superior Court applies equally to an inferior Court. It is a public scandal that this question should arise on the point of what the Judge said ten years ago, and be challenged by people now, who take his own words and explain them for him.

Mr. Justice Williams: Do they contradict the words used by him?

Mr. Baldwin: The words used by the clerk, your Honour.

Mr. Bell: He says the possible explanation of the entry in the minute-book is that the clerk probably obtained the term "confirmation" from the interpreter in translating the word "whakatuturu," which was possibly used by Kemp in applying for the order for Block 14 in his own name, which it is alleged he had already applied for the previous day. And he says he certainly did not confirm the order.

Sir R. Stout: He contradicts the minutes. Therefore my friend says you must accept his memory.

Mr. Bell: Where his memory with regard to the order of blocks is contravened by the minutes the Court accepts the minutes and contravenes Judge Wilson's statement; and we do not dispute its power to do so. But here the question is, what was the intention of the Judge himself; and we submit that if he is clear as to what his intention was, then it is not open by evidence, except by record, to contravene his statement. I cannot understand how the practice could be otherwise in this Court. Supposing a Judge were to make an order in certain terms, and the meaning of the terms were questioned, and the Judge was clear as to the terms, could the Judge, having expressed himself in that way, have his statement contravened, and counsel be heard? If that position would apply to your Honours, I submit there is no reason why it should not apply to a Judge of the Native Land Court.

The Chief Justice: Supposing a question of jurisdiction arose, and there is a conflict of testimony between an applicant for prohibition and the recipient as to when this point was taken, but having got an affidavit from one of the Judges, would they read the affidavit?

Mr. Bell: Yes, your Honour.

The Chief Justice: Then, if they would read the affidavit on one side, why not on the other?

Mr. Bell: In prohibition the Court must be informed.

Mr. Justice Williams: It would be informed by affidavit. The statement of a Judge is not evidence at all; it is in the nature of evidence.

Mr. Bell: I beg your Honour's pardon. In this Court the Court receives a report from the Judge who tried the case; that is exclusive. Then, in the other case I cited, if the Judge's recol-

lection is clear, the affidavit is not to be read to contradict him. If the Court in prohibition were to say that they could not get the answer otherwise than by evidence, how are they going to get the evidence? If a Judge said that at a certain hour he heard a certain thing, then I apprehend it would be conclusive. I submit to the Court that upon the question of principle there is no distinction between a Judge of the Supreme Court and a Judge of an inferior Court, and it seems to have been conceded in the case of the Secondary of London.

The Chief Justice: This is a tribunal set up for the purpose of reviewing the proceedings of the Native Land Court in connection with this Horowhenua Block Act.

Mr. Bell: It is the Native Appellate Court itself. Here the Native Appellate Court, under the Equitable Owners Act, has a report or evidence from one of its own Judges saying that his recollection is clear. Then, is the Native Land Court at liberty to do what this Court is unable to do? I can only leave the position in the way I have put it before your Honours: that this answer to the Appellate Court should be that where there is no record, and the Judge's recollection is clear, it should be conclusive, and that therefore the answer to question 14A should be "No." That is all I have to state on this question of whether the Native Land Court can (Judge Wilson's recollection being clear) accept other evidence to contravene it, and come to the conclusion that he did not intend to give this section to Kemp beneficially; but of course that does not affect the main question. Our point is that it was for the Appellate Court to determine the question of intention, and to determine whether on the 3rd December it was or was not intended as a matter of fact by the Court which made the order of the 3rd December, unless there be an intention of the parties which was not known to the Court, and which was given effect to by the Court in some unintentional way, such as I have suggested in relation to Block 11. The question is what Judge Wilson intended on the 3rd December, and that is the question which was submitted to the Appellate Court to have determined, as the one question remitted by the Equitable Owners Act, and the one question remitted under the Horowhenua Block Act. I propose now to deal with the several questions put to the Court by the Appellate Court. One observation I wish to make first is that the Appellate Court is practically asking in one of their questions whether the concluding words of section 5 of the Horowhenua Block Act, making null and void the certificate of title, did not thereby set up and re-establish the original certificate under the 17th section. Apart from the obvious reply that that is to take away all the effect from the Judge's orders on partition, it is submitted that the subject-matter of the statute is to be looked at, and it is plain that that is so ("Maxwell on Statutes," page 127). It is admitted that section 5, to which I am referring, begins by saying that any order made in pursuance of proceedings under the Equitable Owners Act shall have the effect of vesting such land in the persons so declared respectively to be entitled; and then it proceeds to destroy the Land Transfer titles in order to leave the way open to permit the revesting. It was never the intention of the statute to re-establish the certificate under the 17th section. The Appellate Court started from that, and then assumed there was original jurisdiction to say who would be, under the 17th section, entitled to this block; but the question is whether it was intended by the Court of 1886 to grant this beneficially or not to Kemp. The first question they put is, "Does not section 56 of 'The Native Land Court Act, 1880,' require the assent to a voluntary arrangement under that section of every one of the owners, registered or otherwise, to render it effective, and was it not imperative that the requirements of that section should have been fully complied with prior to giving effect to any such arrangement?" We submit the answer to that is that it is wholly irrelevant. Why should the Court be invited to enter into a discussion of a question of that magnitude? This is a case where notice is given to all the owners, and some of them are dead. It is a block containing 143 owners, and consisting of 52,000 acres. The Natives go outside, and have a meeting at Palmerston North—those of them who can attend. Everybody can go except the dead men, and argument may turn upon that. They make an arrangement among themselves, and the Court proceeds to give effect to that arrangement. Now, section 56 of the Act of 1880 says, "It shall be lawful for the Court, in carrying into effect this Act, to record in its proceedings any arrangements voluntarily come to amongst the Natives themselves, and to give effect to such arrangements in the determination of any case between the same parties." Judge Wilson, rightly or wrongly, arrived at his decision, not only with regard to Block 14, but every block forming part of the 52,000 acres, upon the common consent of the Natives. What we submit is that they ask a question which is not relevant to the inquiry before them, because if we are right in contending that the jurisdiction is limited to the inquiry whether what the Court did, regularly or irregularly, was with the intention of creating a trust, then the question whether the Court proceeded regularly or irregularly, or even without any jurisdiction whatever, is apparently of no importance. Therefore we submit that, first, the answer should be covered by the answer to question 15; and, second, that it should be that the question is irrelevant, and not within the jurisdiction of the Court.

The Chief Justice: We think it would be more convenient to call upon Sir Robert Stout to answer your contention with regard to the general question, as we understand that you say, taking the Equitable Owners Act and the Horowhenua Block Act together, that the real question to decide is whether, with regard to Block 14, the Native Land Court had intended to give a beneficial ownership to Kemp or otherwise.

Mr. Bell: There is one special and somewhat curious question, but I think it is within the point I have been making. If your Honours will look at the pink plan, which was the plan before the Native Land Court, you will see that Block 14 is bounded by the railway-line. No. 11 lies to the westward of the railway-line, and Block 14 lies on the southern corner of the land bounded towards the westward of the railway-line. It is found on the survey that they could not provide the 1,200 acres in that, and several sections are pushed out. No. 11 appears to be a block of 15,211 acres. That is the piece of land out of which Block 14 is cut. Now, turning to the plan signed by Kemp and Hunia—if your Honours will just look at the railway-line on that plan—No. 14 runs across the railway-line and into what was originally No. 11,

No. 11 is shown on the first plan as containing 15,211 acres. There was too much acreage in No. 11, and then No. 6 gets shifted so as to give the area. You will see there is a straight line in No. 6 across the narrow path. The area is given to No. 6 out of No. 14 and No. 14 out of No. 11 with the shifting of the boundaries. It is only No. 14 or No. 11 that is affected. No. 11 is found to have been given too much, and No. 14 cannot be given its area, and it is shifted across the railway-line. We say the No. 14 into which the Act directs investigation is Division 14 mentioned in the schedule. Now, let me state the peculiar circumstance—which is known to the Legislature as appears from the Act—which affects this matter. The 600 acres west of the railway-line, which was originally Block 11, is the land upon which Sir Walter Buller's house stands, and on which all his improvements have been made, and it is the land which the Supreme Court has, by final judgment, ascertained to be his. His house and the Papaitonga Lake are on this land No. 14 on the westward of the railway-line, thus showing that the Legislature, having expressly by the same Act directed the reregistration of any title validly obtained to Division 14, has directed a registration of mortgage to Sir Walter Buller over this land, which now it is suggested by the Native Land Court was not part of 14, but was taken out of Block 11, and is subject to the original trust which the Supreme Court found to exist in respect to Block 11. But, inasmuch as this is only one of the acts of the Court, and inasmuch as the Court did when it finally issued Certificate No. 14 intend that the certificate should include this land west of the railway-line, the question is: Is the certificate valid if it be found that the order was irregular? In the Mangaohane case (N.Z. Law Reports, 9 Supreme Court) the Court had before it a question of the external boundary of a block adjoining Native land unascertained, and the Court held that it was necessary, if any alteration in the boundary were made, to take the steps defined by the Act of 1880 for the purpose of notifying the people whose rights outside the block might be affected by the alteration in the boundary, and that Winiata had a right to insist that the Mangaohane Block had not been properly ascertained. The Court took the precaution in this case, inasmuch as there was a substantial alteration in the boundaries here, to get Kemp and Hunia—the persons nominally entitled—to approve of it. Whether they could give it away or not, they were the persons entitled at law to speak for their *cestuis que trustent*. The persons obviously would be—on the one side Kemp, and on the other side Kemp and Hunia and others representing the *cestuis que trustent*. That is the only substantial point in which the Native Appellate Court do not simply ask the Court to say what is the effect of regularity or irregularity. Here they say this Block 14, as originally defined, has been pushed into Block 11, and they ask the Court whether it did not remain part of Block 11, and therefore subject to the trusts of Block 11. We point out that this Horowhenua Block Act defines it as having an existing boundary; and by the judgment of the Supreme Court the other day Sir Walter Buller is declared to be the person entitled to this very area. It is a curious question, but we submit the Native Land Court must have jurisdiction to shift boundaries on partition, and that sections 26 to 32, requiring plans to be deposited of any boundary, relate only to outside boundaries, and, if not, it was a mere irregularity, which the Native Appellate Court has no jurisdiction to deal with now. The question is, was a trust intended to be created in respect of the area now known as Division 14?

The Chief Justice: You are contending that it is the area as brought under the Land Transfer Act in favour of Kemp?

Mr. Bell: Yes.

The Chief Justice: Not the defined area existing before the final determination?

Mr. Bell: That is so, your Honour.

Sir R. Stout: The determination of the Court was up to the railway-line. This is something done after the Court rose.

The Chief Justice: You are setting up the record?

Mr. Bell: Yes. The question is whether a Court sitting under the Equitable Owners Act would have authority to determine this question.

The Chief Justice: This tribunal was not set up for the purpose of settling every possible grievance, but to ascertain whether there was a trust in reference to this particular block of land.

Mr. Bell: I should like to couple question 16 with question 17.

Sir R. Stout: I submit that my friend has entirely misconceived the legislation that has been passed. First, I want to show what was the existing law in dealing with trusts before the Horowhenua Block Act was passed at all. By the Native Land Act of 1894, section 14, subsection (10), there was ample power to do everything my friend says the Horowhenua Block Act alone does. That section says,—

"Subject as hereinafter mentioned, the Court shall have jurisdiction—(10.) To determine whether or not any land heretofore dealt with by the Court, of which there has been no alienation other than a lease, mortgage, or contract for sale upon which the purchase-money has not been paid, was, on the investigation of title thereto or partition thereof, intended by the Native Land Court, or by the nominal owner or owners of such land (whether such nominal owner or owners be a tribe, hapu, or section thereof respectively, or a definite individual or individuals), to be held by the nominal owner or owners in trust for Natives not named in the title to such land; and to determine who are the Natives, if any, entitled beneficially to any land so held in trust, and to order the inclusion of such Natives in the title, either together with or in lieu of the nominal owners, and for the purpose aforesaid to order the cancellation or amendment of any existing instrument of title, and the issue of such new Crown grants or other instruments of title as may be necessary: Provided that the Court shall not proceed to exercise this jurisdiction unless the Governor in Council shall by order authorise the same to be done."

I submit my friend wants to say that the Horowhenua Block Act gave no further powers than this.

Mr. Bell: Some of this land had been sold.

Sir R. Stout: Yes; 10 or 11 acres had been sold; but most of the block was in this position: the whole of it was mortgaged, but not sold. I submit the Court must look at what this legislation was. The whole of the rest of the 1,100 acres could have been brought under this section, and there was no reason for asking for a re-enactment of the Equitable Owners Act or the Horowhenua Block Act.

The Chief Justice: Is there any clause saving the rights of lessees or mortgagees?

Sir R. Stout: No, your Honour. This was really re-enacting in a form the Equitable Owners Act of 1886. To show the effect of "The Horowhenua Block Act, 1896," one must look at the Horowhenua Block Act of 1895, and that Act says this:—

"The lands comprised in the several certificates of title issued under the provisions of the Land Transfer Act in respect of divisions numbered six, nine, eleven, twelve, and fourteen of the said block are hereby declared to be absolutely inalienable in any manner howsoever until after the last day of next session of Parliament; and no proceeding whatever in connection with the said lands, or any of them, or with any dispute or question which has arisen in relation thereto, or any dealings therewith, shall be commenced or continued in any Court whatsoever so long as such lands shall remain inalienable as aforesaid."

And then it goes on to say,—

"The Governor in Council shall appoint a Royal Commission to inquire into the circumstances connected with the sales or dispositions by the Natives of any or the whole of the blocks contained in the Horowhenua Block, comprising originally about fifty thousand acres, and as to the purchase-money paid for the same, and as to what trusts, if any, the same respectively were subject to; and the costs and expenses of such Commission shall be charged upon such of the lands as the Commission may determine."

Then came the Royal Commission, and after that the Act of 1896, the preamble to which recites the issue of the Royal Commission, and goes on to say, towards the end of the preamble,—and this is what I rely on,—

"And whereas the report of the said Royal Commission and the minutes of the evidence taken thereby are published in parliamentary paper G.-2 of the year 1896: And whereas it is expedient to as far as practicable give effect to the recommendations in the said report set out."

Now, that preamble incorporates the recommendations of the Royal Commission—and I submit that by the authority of cases, as well as by our Interpretation Act, the preamble is part of the Act—the preamble of the Horowhenua Block Act of 1896 deals with the report of the Royal Commission and the minutes of evidence showing what the findings of the Commission are, and then the preamble proceeds to say that the statute is to carry out the report of the Commission, and the report of the Commission was that Block 14 was a block held in trust by Kemp.

Mr. Justice Denniston: Where is the statement that the recommendations of the Royal Commission assume the existence of a trust?

Sir R. Stout: It is not called a recommendation in the report of the Commission; but in their recommendation dealing with Block 14 they state in their report that this is trust land, and say that there must be an inquiry to see whether the leases given by Kemp are valid.

Mr. Justice Denniston: The recitals in the Act do not assume the accuracy of the Commission's findings. What it says is that a separate Commission has reported. You say that the recommendations of the Commission contained an assumption of Kemp's trusteeship. It says the object of this Act is to give effect to certain recommendations.

Sir R. Stout: They could only test the one question—whether the transfers by Kemp of the lease and the transfer of the small bit of land to Sir Walter Buller were valid.

Mr. Justice Denniston: But where is the recommendation which assumes the trust?

Sir R. Stout: The proof is this: that proceedings are to be initiated on behalf of the tribe to test the validity of the leases and transfer given by Kemp to Sir Walter Buller.

Mr. Justice Denniston: The recommendation assumes the tribal ownership.

Sir R. Stout: Yes; and the finding is explicit that the land was tribal land, and did not belong to Kemp himself, and they recommend proceedings to be taken to test the validity of the transfers and leases given by Kemp to Sir Walter Buller.

Mr. Justice Denniston: You say that the recommendation assumes that Kemp is a trustee as to Block 14.

Sir R. Stout: Yes; and that really there is no question of trust for the Appellate Court is practically concluded by the Act, and has not to find a trust at all. That is the only way the Act can be read; and the only reason I have dealt with the preamble is simply to show this: that the preamble, in the words of one of the Judges, is a key to unlock the statute; and if I can show that all the sections can only be reconciled by this assumption that a trust is declared in the section itself, I prove my contention. I submit that is the way he has interpreted the Act. Why is he a claimant?

Mr. Bell: The certificate is set aside.

Sir R. Stout: Why should the certificate be set aside if there was a question of trust or no trust—if the Native Appellate Court had to answer the question. Does a trust exist? But I submit this statute has set aside the certificate. I shall show that this is treated as trust land, and I say the Equitable Owners Act is incorporated by section 3. Then, section 4 goes on to say,—

"To enable *cestuis que trustent* to become certificated owners of certain portions of the said block the provisions of the said Act, excepting section eighteen, 'The Native Land Court Acts Amendment Act, 1889,' shall, notwithstanding anything in the said Act or any other Act now in force to the contrary, apply to Divisions Six, Eleven (less portion known as the State Farm at Levin, containing one thousand five hundred acres, as hereinafter dealt with), Twelve, and Fourteen of the said block, as the said divisions are more particularly described in the First Schedule hereto."

That is, the Equitable Owners Act is to apply to these provisions. Now, the recital of the Equitable Owners Act is this: it says,—

"Whereas under 'The Native Lands Act, 1865,' certificates of title to, and Crown grants of, certain lands were made in favour of or to Natives nominally as absolute owners: And whereas in many cases such Natives are only entitled and were only intended to be clothed with title as trustees for themselves and others, members of their tribe or hapu or otherwise."

Then, it says in clause 2,—

"Upon the application of any Native claiming to be beneficially interested in any land as aforesaid, the Native Land Court of New Zealand may make inquiry into the nature of the title to such land, and into the existence of any intended trust affecting the title thereto."

Into two things they have to make, first, an inquiry into the nature of the title to such lands. Now, let us go back to section 4 of the Horowhenua Block Act of 1896:—

"In exercising jurisdiction under this section the Court shall deal with the claims of the forty-eight persons named in the Second Schedule as if their names had been included in the list of persons registered under the provisions of the seventeenth section of 'The Native Lands Act, 1867,' as specified in Schedule Six hereto, as the owners of the said block, and may also limit the interest of, or wholly omit from any order made under the provisions of this Act the name of, any person who, having been found to be a trustee, has, to the prejudice of the interests of the other owners, or any of them, assumed the position of an absolute owner in respect to any former sale or disposition of any portion or portions of the said block, or for any other sufficient reason."

Now, I submit this cannot read as the Equitable Owners Act reads. It says that the forty-eight persons are to be put in the list of persons registered as the owners of the said block. How can they be registered as owners of the said block if there is no trust?

Mr. Bell: That is not Block 14.

Sir R. Stout: It includes Block 14, because it is dealing with certain portions of the said block —namely, Divisions 6, 11, 12, and 14.

Mr. Justice Denniston: If it turns out to be a trust it would bring in these forty-eight; but you say it assumes the existence of a trust.

Sir R. Stout: Because it says, "and may also limit the interest of or wholly omit from any order made under the provisions of this Act." I say that these two parties have been found by the Supreme Court, as well as by the Royal Commission, to be trustees. "Having been found" means having been found by the Supreme Court prior to the passing of this Act. Can the Court say that it is left to the Appellate Court to say whether there is a trust in Block 11 or not? That has already been found. Has the Appellate Court jurisdiction to inquire whether the Supreme Court and Court of Appeal are correct? Block 11, it says, is trust land, and the Appellate Court is only to find out who are the beneficiaries. I say "having been found" implies the question of that trust, nor is there anything saying that the Appellate Court—nor has it been attempted to be set up by any of the parties that the Appellate Court—should sit and determine the ownership of this block. Section 14 of the Horowhenua Block Act says, "All Orders in Council, judgments, decrees, or orders whatsoever now or at any time heretofore affecting the said block shall, so far as they conflict with the provisions of this Act, be void and of no effect."

Mr. Justice Denniston: Does the Equitable Owners Act apply to Block 11?

Sir R. Stout: Only so far as to find the beneficial owners. It will apply except as controlled by this statute.

The Chief Justice: It is curious that the Legislature should have been so careful to put in this provision that the report of the Royal Commission should be acted upon, but should not go on to say, "Of course you are bound by its conclusions."

Sir R. Stout: The conclusions of the Royal Commission are not taken on certain things. The Commission dealt with relative shares, which this Court was not to listen to. I come now to section 5, which says,—

"Any order made in pursuance of proceedings under this Act declaring the persons beneficially entitled to the said Divisions Six, Eleven (in part), and Fourteen, or any of them"—that is again, I submit, an assumption of a trust—"shall have the effect of vesting such land in the persons so declared respectively to be entitled for an estate of freehold in fee-simple as tenants in common in such relative shares or interests as are specified in, and as from the date of the making of, each such order, anything in any Act now in force to the contrary notwithstanding; and such persons, and the successors of such of them that are deceased, shall, on the production of such order to the Registrar, be entitled to be registered as proprietors, and to have issued to them a Land Transfer certificate in respect of the land comprised therein."

And then it says, "and any existing Land Transfer certificate, and all registrations of dealings thereon in respect of any such land, shall, subject to reregistration of dealings found not to be invalid as hereinafter provided, be deemed to be null and void as from the date of the passing of this Act."

You will see that all the land transfers are set aside. It is not left to the Appellate Court to set the title aside, but the title is gone. What is the title which is left? My friend opened by assuming that the title is gone, and then assumes there is a title in Kemp.

Mr. Bell: The Act requires upon partition that the Crown grant shall be cancelled before partition.

Sir R. Stout: That is a very different thing.

Mr. Justice Williams: The Act clearly contemplates the issue of separate certificates.

Sir R. Stout: No doubt; I am coming to that. There is no title left in Kemp except the Native title.

The Chief Justice: You say it sweeps away the Native Land Court certificates. Go back to the Native Land Court orders made in 1886. I do not see anything here which says that all these have to be treated as nullified.

Sir R. Stout: Perhaps not; but suppose they remain, there is no certificate of the Native Land Court. I want to point out that these certificates are set aside, and I submit they would not have been set aside except in the assumption that this was trust land. That is proved by what takes place in subsection (*f*) of section 8 of the Horowhenua Block Act. It says,—

"A certificate of title for any portion of Division Fourteen aforesaid, of which any valid alienation in fee-simple had been made as aforesaid in the name of the person or persons entitled by virtue of such alienation: Provided that no certificate of title shall be issued except pursuant to final judgment in the proceedings hereinafter directed to be instituted by the Public Trustee."

And then in section 10 it says,—

"For the purpose of testing the validity of the alienation referred to in subsection (*f*) of section eight hereof, and also of all dealings the registration whereof has been cancelled as aforesaid, the Public Trustee is hereby directed and empowered to institute on behalf of the original registered owners of the said block, as set forth in the Second and Sixth Schedules hereto, or any of them, such proceedings in the Supreme Court at Wellington as may be necessary for that purpose within six months from the date of the passing of this Act."

That, I submit, is conclusive proof that the Legislature deemed this to be a trust block. If it is contended that the Appellate Court was to determine whether it was a trust or not, how can there be an action which had to be commenced within six months on behalf of the tribe to have this settled? The Appellate Court has not yet sat, and if you say we ought to commence the action, how could the action referred to here apply? I say the Legislature declared that the action should be begun by the Appellate Court to test the validity on behalf of the tribe, and that assumes that they are beneficiaries; and why determine this action before the Appellate Court states whether there is a trust or not? The original registered owners are the original tribe with the forty-eight added.

Mr. Justice Denniston: They are not read in as equivalent to the registered owners.

Sir R. Stout: Yes.

Mr. Justice Denniston: No. Section 4 gives the Court certain powers, but does not identify them.

Sir R. Stout: They are identified in section 10. I therefore submit that it cannot be said that, prior to the commencement of this action in the Supreme Court to test the validity of the dealings with this block, the Appellate Court had first to determine whether there was a trust or no trust. Now, the Chief Justice has practically decided that it was preliminary. That, again, I say, proves my contention that the Act treated this as trust land.

The Chief Justice: I do not know that I actually decided it. All I said was that there was reason to keep back the action.

Mr. Bell: We contended that Sir Walter Buller had two defences. He could show—(*a*) No trust; and (*b*) no notice. That was the position presented to your Honour.

Mr. Justice Denniston: You say, although the Act nowhere declares that this question of trusteeship has already been decided adversely to this man Kemp, still you can spell out in the Act a power for taking away this man's interest except as a trustee.

Sir R. Stout: I say, giving effect to the recommendations of the report of the Royal Commission is the object of the Act. They are based on the findings of the Court, and the findings and recommendations show that the Commission have found that the block is a trust block; and it is recommended, not that the Court should find a trust or no trust, but that the people beneficially interested should be found; and, secondly, whether this transfer to Sir Walter Buller was valid or not—that that should be tested.

Mr. Justice Denniston: Where are the recommendations?

Sir R. Stout: There is no word "recommendations"—that word is not used; but there are suggestions at the end of the report. Then, the Court will ask, what is the tribal estate? Well, it includes Block 14—the Commission have found it to include Block 14. They say that all the blocks except 1—9 and 10—are subject to a trust for the members of the tribe; and when they speak of "a tribal estate" they mean Block 14.

Mr. Justice Williams: The Act nowhere says that. The Legislature has assumed that there is a trust. Does that bind anybody?

Sir R. Stout: Yes, it does. That is the reason I have referred to the preamble of the Act, which, as a learned Judge has said, is the key to unlock the statute. If I can show that the whole of the sections of the Act can only be reconciled on the assumption of the existence of a trust, then the Court will be bound by it. If it is not a trust, then I say the Act is irreconcilable. It authorises the Public Trustee to issue certificates of title on behalf of the tribe; and how could he issue them on behalf of the tribe if they were not beneficiaries?

Mr. Justice Denniston: Kemp and Sir Walter Buller are out of the question as parties. Does it amount to anything more than that the Public Trustee, acting for the persons who claim to be beneficial owners, shall bring an action? There are three persons—the Public Trustee, Kemp, and Sir Walter Buller—and these three are excluded from bringing the action.

Sir R. Stout: The answer, I say, is conclusive as to that. The beneficial owners cannot bring an action until the trust is found. If the Act has assumed they are beneficiaries, then section 10 is readable and understandable. If the Act says the Appellate Court has to find the trust, then I submit the Act is unreadable. I say, reading the Act altogether, it can only be read on the one assumption—that the Legislature proceeded on the assumption that Kemp is a trustee, and that the land is tribal land, and then it declares who is to act for them. Otherwise, why not wait until the Appellate Court has decided whether there is a trust?

Mr. Justice Williams: Before this Act Kemp claimed a complete beneficial interest in this block; and you say the Act takes that away?

Sir R. Stout: Yes; and that the beneficial interest is not defined. He might be held to have the whole of it under the Equitable Owners Act. The quantum of his interest is not taken away, but other people are interested with him: that is all. That, I submit, is the only way the sections

of the Act can be reconciled. I say the very fact that they are limited to six months proves that they are not to wait for the decision of the Appellate Court. There is no limit within which they are to make application to the Native Appellate Court.

Mr. Bell: Our construction of section 10 in the Supreme Court proceedings was this: that Sir Walter Buller was intended by the statute not to be bound by the Appellate Court. Our contention all along was that section 10 conferred upon Sir Walter Buller the right to stand out of the Appellate Court, and to have his right to appeal to the ordinary Supreme Court.

Mr. Justice Williams: Section 10 only refers to the alienation of section 14.

Sir R. Stout: They admitted that he had no notice of the trust.

Mr. Justice Williams: Then, section 10 has been suspended.

Sir R. Stout: I am using the argument for the purpose of showing that this section 10 and subsection (*f*) are not understandable unless on the assumption that the Legislature has conceded that they are beneficiaries. If they are not beneficiaries, then the section ought not to have been in this form. But if the Appellate Court finds them to be beneficiaries, the Public Trustee can attack Sir Walter Buller's title. I suggest that it is a recommendation of the Commission that this is tribal land, and if it is tribal land it is Native land, and the Legislature has assumed that. The recommendation is this: We suggest that the tribal estate be vested in the Public Trustee. What do they mean by "tribal estate"? It means Block 14. The Court must understand that the Legislature had authorised the Commission to settle this question—to find a trust or no trust. "The Horowhenua Block Act, 1895," says: "The Governor in Council shall appoint a Royal Commission to inquire into the circumstances connected with the sales or dispositions by the Natives of any or the whole of the blocks contained in the Horowhenua Block." And the Legislature has chosen to appoint a tribunal for that purpose.

Mr. Bell: If it had a judicial function, and came to a judicial conclusion, and the Court is satisfied that that is so, we shall certainly not contest that position.

Sir R. Stout: The Legislature has said this: that the Governor in Council shall appoint a Royal Commission to inquire into the circumstances, and as to what trusts, if any, the same respectively were subject to. I submit it is just the same as if they had appointed a Native Land Court. They are to inquire "as to what trusts, if any, the same respectively were subject to; and the costs and expenses of such Commission shall be charged upon such of the lands as the Commission may determine."

Mr. Justice Williams: Apart from the Act of 1896, no one is bound by the report.

Sir R. Stout: Yes, that is so; but when the Legislature was passing the legislation of 1896 it was giving effect to the provisions of the statute passed in 1895. The position is this: I submit that the Legislature has started by appointing a body to inquire into the existence of trusts. It gets its report, that report finds trusts, and the Legislature then proceeds to give effect to its recommendations, and a recommendation is that the tribal estate, which includes Block 14, should be vested in the Public Trustee.

Mr. Justice Denniston: When the Act uses the words "tribal estate" you say that the Act reads into it the findings of the Royal Commission?

Sir R. Stout: I say the Act does this: it is just the same as if the Act recited the full report of the Commission.

Mr. Justice Denniston: Where is the section which speaks of the "tribal estate"?

Sir R. Stout: That is in section 16 of the report. As to how the preamble is to be read, I might refer to a late case. It is part of the judgment of one of the Lord Justices—Powell against The Kempton Park Racecourse Company (68 Law Journal, Q.B., page 617). What was the object of the passing of this Act? It is inconceivable that the sections would have been framed in this way if it had not been meant that they were to be treated as declaring that a trust exists. Assuming that the Appellate Court has to find a trust or no trust, they are not to start with any root of title and build up a trust from that. They have to look at the whole matter. Surely they would have sufficient power as a Supreme Court to find whether there was a trust or no trust. They are not confined within the four corners of the Equitable Owners Act, although it is true that Act is incorporated with the Horowhenua Block Act. I ask the Court to note that under the Equitable Owners Act they have power to inquire into the titles of land, and in section 15 of "The Horowhenua Block Act, 1896," it says,—

"For the purpose of carrying out the provisions of this Act, the Court shall have and may exercise, as the nature of the case requires, in addition to the special powers hereby conferred, all the powers and jurisdiction of the Court under 'The Native Land Court Act, 1894,' and 'The Native Land Laws Amendment Act, 1895.'"

That means that they were to have all the powers of the Native Land Court as well as all the powers of the Appellate Court; so that the Court will notice that the jurisdiction is extensive. Your Honour asked me what would happen in the case of a mortgage of lease. That is provided for by the Act of 1884, section 58. I want further to point out what jurisdiction this Appellate Court had. Suppose I could show that now the Land Transfer certificate of title has been removed, and that the orders of the Court are made without jurisdiction—we will assume that the Land Transfer certificates are set aside, and what was left were the orders of the Court—could I not have gone on behalf of these people to the Supreme Court and asked for *certiorari?*

The Chief Justice: If you were proceeding under the Equitable Owners Act, Mr. Bell assumed you could not. You must look to what could be done under the Equitable Owners Act, and what could be done under that could be done by the Horowhenua Block Act.

Sir R. Stout: The Equitable Owners Act, it is true, was incorporated with the Horowhenua Block Act, but we are not limited. Supposing the Supreme Court had power, they would not have the power under the Equitable Owners Act. Supposing it was in existence, and there was no Land Transfer certificate, but only the certificate of the Court, could not I apply for *certiorari*, as in the Mangaohane case? I submit I could, and contend that my friend could not maintain the

contrary. If I could do that before the Supreme Court, what power has the Appellate Court to deal with the question? By the Act of 1895 the Court will see that the Appellate Court has all the powers of the Supreme Court. Section 58 of the Native Land Laws Act says,—

"In any case in which, but for this Act, recourse might be had to the Supreme Court, the remedy shall be by application to the Appellate Court, which shall have full power on such application to deal with and finally determine all questions at issue, and to grant such relief as to such Court shall seem just, or as shall in the opinion of the Court be necessary, having regard to the nature of the case and the rights of the parties."

Now, the Native Appellate Court, under section 15 of "The Horowhenua Block Act, 1896," has this special jurisdiction conferred upon it, because it expressly says,—

"For the purpose of carrying out the provisions of this Act, the Court shall have and may exercise, as the nature of the case requires, in addition to the special powers hereby conferred, all the powers and jurisdiction of the Court under 'The Native Land Court Act, 1894,' and 'The Native Land Laws Amendment Act, 1895.'"

So far as I make out, Kemp has only applied for Section 14 in his application; but others have applied for Sections 6, 11, 12, and 14. With regard to section 58 of "The Native Land Laws Amendment Act, 1895," there was power under that for the Native Appellate Court to do what the Supreme Court could have done by *certiorari*. The Supreme Court had no power to deal with Native lands except perhaps by mandamus, and all these powers are expressly given to the Native Appellate Court by section 58 of "The Native Land Laws Amendment Act, 1895," and it has power to do that under section 59, which says,—

"The Appellate Court shall have supreme jurisdiction in all questions as between Natives and Natives affecting the title to any Native land, or to land or personal estate owned by Natives; and shall exercise or decline to exercise such jurisdiction free from the interference or control of any other Court whatsoever; nor shall any proceeding relating to any such matter as aforesaid be removed from the Appellate Court into any other Court by writ of *certiorari* or otherwise."

Now, if the Supreme Court had jurisdiction, has not the Appellate Court the right to inquire as to whether these were valid orders or not?

Mr. Justice Denniston: Assuming that, according to your present construction, the question of trust had not been determined, your argument would go to show that this man's statutory rights have been taken away, and, having been taken away, it was intended that the Court should declare him a trustee, not on account of any fraud or impropriety, but on account of a preliminary error in the proceedings of the Court.

Sir R. Stout; No, your Honour. The point is this: If the Native Land Court had no jurisdiction to make the order vesting the land in him, surely the Appellate Court has the right to decide that.

Mr. Justice Denniston: Supposing there had been no fraud or misconduct, is it credible that the Legislature would remove his rights, and allow a Court to open this matter?

Sir R. Stout: What happened in the Mangaohane case when the Supreme Court found an order had been made without jurisdiction? I am arguing that the Legislature has not said there was a trust. Then, how can a trust be found?

The Chief Justice: I hitherto thought *cestuis que trustent* was an expression used for registered owners.

Sir R. Stout: I say that *cestuis que trustent* means *cestuis que trustent*, and not registered owners. But I have left that point. I am dealing now with the assumption that the Legislature has simply set the land certificates aside, and the question is whether we can attack these certificates of 1886.

The Chief Justice: The answer to you is this: that the main idea of the Act, plainly stated, is that whatever jurisdiction was given to the Native Land Court under the Equitable Owners Act —and that is the primary thing you have to look at—it is perfectly true that the Native Land Court Act may properly be used for the purpose of allotting the interests, and to find out what the interests are. The main idea is first to find out what, if any, trust there is. There are certain certificates or orders of the Native Land Court, and everything after that is swept away. Now, there are some people who say they have a kind of interest which could be traced under the Equitable Owners Act, and the Legislature say that, notwithstanding that the Equitable Owners Act has been repealed for this purpose, the Act shall be revived, and these people's claims dealt with under that Act.

Sir R. Stout: My answer to that is twofold: The Horowhenua Block Act says the Equitable Owners Act is revived, but it does not stop there. The Act confers far greater power on the Appellate Court in dealing with this block than any Court had when the Equitable Owners Act was in operation, for the purpose of finding out whether there was any trust or not. Now, how is that to be found out? In the case of Warena Hunia and Kemp the certificate did not state there was a trust, and the Supreme Court proceeded to find out how that land became vested in Kemp and Warena.

The Chief Justice: Could the Court, under the Equitable Owners Act, have done that?

Sir R. Stout: Yes. I say the words "inquire into the titles" include everything.

The Chief Justice: You say that under the Equitable Owners Act the whole thing could be ripped up, and the invalid proceedings in the Native Land Court could be inquired into, and if found to be invalid redress could be given.

Sir R. Stout: Yes.

The Chief Justice: You say there is nothing in the Equitable Owners Act which would limit the power of the Native Land Court to set aside all these proceedings.

Sir R. Stout: Yes; and the best proof of that is this: How are you going to prove a trust? A certificate may disclose no trust; you must go behind it. But I do not rely upon the Equitable Owners Act alone; I say section 58 of the Native Land Laws Amendment Act of 1895 gives the

Appellate Court all the jurisdiction of the Supreme Court. If the Supreme Court could find a trust after the certificate was issued, as they did in Warena Hunia and Meiha Keepa, how did the certificate come to be issued? I would refer the Court to the judgment of his Honour the Chief Justice in the Court of Appeal. I do not ask any further powers than that. The whole point turns upon the voluntary arrangement. If Judge Wilson in this case had chosen to say, "I made this order in pursuance of my jurisdiction as an Assessor under the Native Land Court Act," then this voluntary arrangement would have nothing to do with it; but it is admitted in the Supreme Court, and asserted in the Appellate Court, that Judge Wilson proceeded under a voluntary arrangement, and did not come to any decision at all. Now, what is the Native Appellate Court doing? It is not doing so much as the Supreme Court did; and is it to be said that this Court has not the powers of the Supreme Court to say whether there is a resulting trust or not? Supposing it was said that many of these people were dead, and that others who were living were not present, can it be said that this is a voluntary arrangement, in the face of what the Chief Justice said in relation to this matter? If we can show that the owners did not make the conveyance, and did not consent to the voluntary arrangement, is there not a resulting trust to them? It is a question whether the owners of the land had given up their land or not. In the case of Mahuka *v.* Smith the non-appearance of the parties may not have affected the jurisdiction of the Court; but here the assumption is that it is a voluntary arrangement. I say, then, we have conveyed, and how are we bound? Therefore, that is a question of trust. Even if the Court had not the vast powers conferred upon it by the Act of 1895, they could proceed under the Equitable Owners Act. Now, to take this point about the plans. The Court said the block went up to the railway-line, and the Judge, without the Assessor, chooses to put 600 acres into it.

Mr. Bell: It was the surveyor.

Sir R. Stout: There are 1,200 acres on the side of the railway-line; but what right have they to go into Block 11, which the Supreme Court has declared is a trust block, without the consent of the *cestuis que trustent?* There is an expressed decision by the Court of Appeal on this point—that the Court cannot do this thing that has been done. Your Honours will see what "The Native Land Court Act, 1880," says on this point:—

"27. In cases in which no such plan and description are in possession of the Court, it shall require a survey, if not already made, to be made, and a sufficient plan and description to be deposited in Court.

"28. As soon as the requirements of the next-preceding section are complied with, it shall be the duty of the Court to give notice, in such manner as it may think best adapted to attract the attention of all persons whom it may concern, that the plan is ready for inspection at a place to be named in such notice.

"29. If any person is desirous of making objection to the boundaries as defined by the plan, he shall give notice thereof to the Court, stating the grounds of objection.

"30. On receiving such notice, the Court shall proceed to adjust the boundaries according to the rights of the several parties interested, and for such purpose shall have and may exercise all the powers vested in the Court.

"31. If no objection is made within the time to be fixed by the Court, or if objection is made and not substantiated, the plan as finally settled by the Court shall be signed by one of the Judges and deposited in the Court as a record thereof.

"32. The land delineated by the plan so settled shall be deemed to represent the land in respect of which the order has been made at the original hearing, and, if any amendment has been made in the description, an amended description shall be placed on the records of the Court."

Now, the Court means a Judge with an Assessor. What happened was that this plan was made, and that the boundaries of the blocks were considerably altered—for example, portion was taken out of Block 11. The blocks were considerably altered, and no consent was given except that of the two trustees. They have no power to give up 600 acres of the *cestuis que trustent* land. This is the case of two trustees, one of whom is giving up to the other 600 acres of land. That is what it amounts to. Kemp and Hunia gave up to Kemp 600 acres without consulting the *cestuis que trustent*. I would refer the Court to what Mr. Justice Williams says at page 753, Vol. 9, of "The New Zealand Law Reports." How does the Appellate Court stand? It has produced to it certificates that have been issued without jurisdiction. Is there anything in the statute to make those certificates good? It has the power to quash them, and surely it had a right to ask, when inquiring into the title, whether the Court which issued the certificates had a right to deprive the *cestuis que trustent* of their land. Surely the Court would have the right to say that this Block 11 is a trust block. Kemp himself admitted that. Well, the surveyor, my friend says, has given 500 or 600 acres of this block contrary to the voluntary arrangement come to in the Court. Has not the Appellate Court the right to say that this 500 or 600 acres affirmed to be a trust block should be given up? What power has the surveyor to set it aside and issue the certificate? I submit the Appellate Court has the right to inquire into that, and that under the Equitable Owners Act they would have the right to inquire into the nature of the title. What do they find? That a bogus certificate was issued—a certificate issued without jurisdiction. Therefore, have they not a right to say that the block, as far as this 600 acres is concerned, is a resulting trust? This is sufficient to show that the Native Appellate Court would be bound to find that this land was a trust, because the Court had originally found it to be so. Now I come to the next point: When was this certificate or this order first made? They have a right to ask that, surely. All these facts were gone into by the Supreme Court when it inquired whether there was a trust or not; and what have they asked about this? What happened on the 25th November, and on the 2nd and 3rd December? Here comes in this question of what happened with the Judge. My friend has shown, with regard to a Judge's recollection, what is the rule of practice, and says it is not a rule of evidence at all, and it is provided for in England as the rule of England. It is Order 59, Rule 8, if I remember rightly. It is only a rule of practice, and has nothing to do

with evidence at all. In the Courts at Home they take the shorthand notes instead of the Judge's notes, but it is a pure rule of practice. The Judges still take their notes, according to the practice, as to what really happens in the Court below. But it is not a question of evidence at all, but a question of practice. Judge Townsend said a Judge's notes were no better than anybody else's notes, and Judge Talford said a Judge's notes stood in no other position than anybody else's notes (Regina and Child).

Mr. Justice Williams: They could not be put in as evidence.

The Chief Justice: Mr. Bell limited his contention to what the Court itself did.

Sir R. Stout: As the Native Land Court is a Court of record it is bound to keep minutes of its proceedings. If its minutes of proceedings conflict with the Judge's notes, and the Court amended that note, the Judge must amend the proceedings with his notes. Now, in this case he had no notes. The case I quote on this point is 5 "Cox's Criminal Cases," page 203. What has happened in this case is this: The Appellate Court says that the Judge's recollection contradicts the Court on one point. Are they to accept his recollection? I submit the answer should be that they should not. The point is this, dealing with this question of recollection: According to the minutes of the Court the Court sat with one Assessor; then the constitution of the Court was changed, and another Assessor came in. The evidence is that on the 25th November this block was called Block 3, and that appeared to be so from the plan, because Block 3 is on the plan. They did not have the plan before, but they have found the plan, and that shows that Block 3 appears on the original plan. Now, the position is this: It appears, then, from the maps and from the records of the Court that this block was set aside for Kemp, as a trustee, on the 25th November, as Block 3. Now, we will start with that. Secondly, it appears from the minutes that what the previous Court had done on the 25th November was confirmed on the 3rd December. What was confirmed? The trusteeship was confirmed. That appears from the Court's minutes.

Mr. Bell: No.

Sir R. Stout: I do not say the word "trusteeship" was mentioned, but I say the block was given to Kemp for a special purpose on the 25th, and that is undisputed.

Mr. Justice Denniston: There is no record of that on the minutes.

Sir R. Stout: It was a trust when it was first given to Kemp. That the other side do not dispute. Now, when did he cease to be a trustee? There is nothing on the face of the records to show when he ceased to be a trustee, but, on the contrary, there is the word "confirmed," and how is it explained?

Mr. Justice Denniston: Suppose it only amounted to a confirmation of the allotment to Kemp?

Sir R. Stout: Then, the onus rests upon them. Once a mortgage, always a mortgage; once a trust, always a trust. They must show that the trust was divested.

Mr. Justice Denniston: There is no suggestion to give both these pieces of land?

Sir R. Stout: No, your Honour, but they had the option to take either. Question 13 says,—

"It is contended on behalf of the persons who assert that Meiha Keepa is only a trustee for Subdivision 14 that the foregoing minute supports their contention that the order made on the 3rd December is merely a confirmatory one of the order for the same parcel of land the order for which was pronounced and entered on record on the 25th November as No. 3, and then vested in Meiha Keepa to Rangihiwinui for the descendants of Te Whatanui, in fulfilment of the arrangement between himself and Sir Donald McLean."

The fact is that Te Whatanui's people are now at loggerheads; they say they have been wrongfully excluded. Their choice was not completed until three years afterwards.

Mr. Justice Denniston: Whether or not the choice was binding is another matter.

Sir R. Stout: I am putting it like this: Suppose there is evidence of it, can the Court find it? That has been the point I am arguing. I say the Court can find, on the other hand, that it was a trust. I am only arguing on this point to show that the voluntary arrangement meant the conveyance, and that it lacked validity because the registered owners were not there; some were dead. Secondly, those who did consent to Kemp getting Block 14 (and we assume it was consented to), then it was the block bounded to the west of the railway-line, and Block 14 has been put above Block 11, and that was illegal and without jurisdiction. And, lastly, I say that, as this Block 3 had been made a trust block, there is no evidence that that block was given to Kemp beneficially afterwards; or I will put it that there was evidence, and argue it both ways.

Mr. Justice Denniston: Supposing it was clear that there was an exchange, then we get rid of the question of the *cestuis que trustent* as to Block 14.

Sir R. Stout: No, because there is the other piece across the railway-line. Of course, if it was contended that the exchange was assented to, I say it was not a voluntary arrangement unless it was assented to by the whole tribe.

Mr. Justice Denniston: The basis of the legislation was that Kemp had this land really given to him, not beneficially, but for the benefit of his tribe, and that was the whole reason why he was attacked; not that he had got the wrong piece of land.

Sir R. Stout: The position of the matter is this: If the minute-books stand, they contradict Judge Wilson on the main point. He says this block was never before him at all until December. That is the main point, and they contradict themselves on that main point. The next point I want to refer to is the question of how the Court is to deal, under the Equitable Owners Act, with the trust at all. In Native matters I submit the Court has to find out the title. Now, in dealing with this matter, what would the Court have to do? They would have the right to trace this land down from the time when it was Native land. When it was found to be Native land, what was the first finding of the Court? That the whole of this block of 52,000 acres is tribal land. It was found that Kemp was chief, and that the land was wholly given to him as trustee. Then, the Court would next find that there was a partition of this land, and then that at this partition the people entitled

—viz., the registered owners—were not present. Then they would find that the Court did not purport to partition the land by virtue of the powers the Native Land Court possessed, but in pursuance of an alleged voluntary arrangement. Next they would have to find that what lies at the basis of the voluntary arrangement is that the persons interested as registered owners were not present. They would have to find that the registered owners were not present, and therefore there could be no voluntary arrangement. Now, the section dealing with voluntary arrangement is section 56 of the Act of 1880. I am dealing now with how the Court must proceed under the Equitable Owners Act.

Mr. Justice Denniston: You are assuming that we have the right to look into the claims of owners who were not present?

Sir R. Stout: Yes, your Honour.

Mr. Justice Denniston: Is not that sufficient without going into the question of what the result would be?

Sir R. Stout: No. We have in this case to start with a trust existing, and the next question is, How is that trust divested? Under the Act of 1873 the trust existed.

Mr. Justice Denniston: A trust as to certain land, which was subsequently divested.

Sir R. Stout: No; a trust is created. I want to know how this trust is to be got rid of. I venture to say this: that in all the cases which have come under the Equitable Owners Act they have had to begin with this investigation, and to deal with it. They have then to say a trust exists. How is that trust to be got rid of? The answer by the other side is, By voluntary arrangement. What does the Act provide for in a voluntary arrangement? Section 56 says,—

"It shall be lawful for the Court, in carrying into effect this Act, to record in its proceedings any arrangements voluntarily come to amongst the Natives themselves, and to give effect to such arrangements in the determination of any case between the same parties."

Now, the point here is this: Can there be a voluntary arrangement not recorded? Upon that his Honour the Chief Justice has expressed an opinion in the case of Hapuku *v.* Smith (12 N.Z. Law Reports, p. 163):—

"The next point is that it is said that the Court acted upon a voluntary arrangement without the evidence of a writing signed by the parties, as required by the statute. It is said that that would be without jurisdiction. Conceding this to be a matter given to the jurisdiction, though I think it is doubtful, but conceding that, we have here the Natives who are now making this application alleging that they were not parties to any arrangement. We have those on the other side saying that they did not ask the Court to give effect to any arrangement; and we have the Judge and Assessor saying that they did not act upon any arrangement, but that they acted upon the evidence before them. We have to say now, Was the Court, in fact, deciding upon the evidence, or was it giving the go-by to this statute?"

That is the only thing that has reference to it. The Chief Justice seemed to be doubtful whether it went to the jurisdiction. I submit that this recording the proceedings of a voluntary arrangement is something precedent to the exercise of jurisdiction of a voluntary arrangement, and, until the voluntary arrangement was recorded, the Judge could not carry it out administratively. I am ready to admit that, if the Judge had chosen to say, "I am making a partition on the evidence," then Hapuku against Smith shows that we have no jurisdiction whatever; but I say that in this inquiry it will be discovered that there was no voluntary arrangement recorded in the minutes, which I say is condition precedent; and if they had the minutes, and the minutes were a correct record, they would show that the parties interested were not present. Now, I submit, if that is so, the original trust of this land was never divested, and it remained just as it remained in Block 11, because the Court of Appeal lays down this, that there is to be a resulting trust in this very case, in the Court of Appeal's judgment. The judgment is too long to quote fully. [Counsel here read extracts.] I submit the whole of this judgment is strongly in our favour, because it starts with the assumption that there was a trust existing under the Act of 1873, and that that trust had to be divested, and that trust could only be divested by two things—either by a judicial termination or a voluntary arrangement. Now, there was no judicial termination, and we submit there was no voluntary arrangement, and therefore the trust exists; and I submit that is a question which the Court, sitting under the Equitable Owners Act, must inquire into. How can you inquire whether a trust exists unless you take the whole dealings? Kemp was a trustee of the block, and gets part of the block for himself. It is not a transfer of title. He held before 52,000 acres: is he now a trustee for 1,200 acres? How can you ascertain that, unless you can go into the history of the trusteeship? Then, you must have the history of what took place in Court. My friend sets up a voluntary arrangement, and surely the Court has a right to say that there was no voluntary arrangement. The whole basis of the case rests here: Was there a voluntary arrangement? And we submit there could not be a voluntary arrangement, because the registered owners were not present to come to that voluntary arrangement. The trust, therefore, must still exist.

Mr. Justice Denniston: The Land Court could determine that.

Sir R. Stout: I do not dispute their jurisdiction.

Mr. Justice Denniston: Has not the Judge declared, as a matter of fact, that there was a voluntary arrangement?

Sir R. Stout: That will not help my friend. The Judge says he knows they were not all present. To show the jurisdiction you must show the voluntary arrangement; but it is not entered in his book that there was a voluntary arrangement.

Mr. Justice Denniston: But is not the finding of the Judge to the effect that there was one?

Sir R. Stout: There is no finding that there was one; he did not find it as a Court.

Mr. Justice Denniston: He could give his decision only in two ways—judicially or administratively—and it must be based on his findings.

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

necessary to show that the certificates of the Court are invalid, this is ancillary to the question of a trust, and therefore it is immaterial to us, because we say the Appellate Court can utilise every power it possesses to find out whether there was a trust or not. Let us look at the Equitable Owners Act. There are far more extended powers under the Horowhenua Block Act. In the Equitable Owners Act the Court is not confined to the existence of a trust. No trust might have been created, and yet under the Equitable Owners Act people may be declared beneficiaries. The words are, "According to the result of such inquiry the Court may declare that no such trust exists; or, if it finds that any such trust does or was intended to exist, then it may declare who are the persons beneficially entitled."

Mr. Bell: "Was intended" must mean some trust not intended. It depends upon the meaning of the word "exist."

The Chief Justice: There are three terms: "Trust does exist," "Trust does not exist," "Trust was intended." Mr. Bell is ready to accept——

Sir R. Stout: Very well; if he accepts it it obviously means the Court made no declaration, because "was intended to exist" must mean intended to exist by the owners; that is a conveyance —a voluntary arrangement. The Court did not declare Block 11 was a trust. The Supreme Court went behind the certificate of the Court, and I submit the Appellate Court had all the powers of the Supreme Court in its Native jurisdiction. Who intended it to exist? It must be the registered owners. Then, we have to come to this position: "Who were the registered owners?" the Appellate Court would have to ask, and "What did the registered owners do?" Suppose they had not appeared before the Court at all, could it be said that Kemp had a right to get this land free of trust? He was already a grantor of the land in a sense, and remained a grantor, or his trusteeship altered. It is admitted that he was, unless the trusteeship was altered; and who could alter it? I therefore submit that under this head the Appellate Court has a right to inquire into all the dealings, and say whether this trust was put an end to by the owners of the land—that is, the beneficiaries and registered owners; and I submit that is all we ask; and all these inquiries and questions put by the Appellate Court lead to that. I admit that some are of little importance, but they are all leading up to one point. Have we evidence that these grantors gave up their trust? Did they intend to do so? The onus lies on them to show that the trust was actually destroyed and intended to be destroyed. How can they prove that? Only by dealing with the investigation before the Court, and showing that this voluntary arrangement was a voluntary arrangement that was come to by all the owners, or by all the persons interested; and if all the persons interested did not assent to Kemp getting the land, then the trust is not destroyed. That also has a bearing on this question of the map and the alteration of the boundaries. I should call the giving of a different block of land—nearly 600 acres on the western side of the railway-line, outside Block 11—which the Supreme Court has found was a trust, land given by one trustee to another.

Mr. Bell: Of course, we contend that Block 14 is defined by the order, the same as with Block 11—that is, Block 11 as shown on the amended plan.

Sir R. Stout: The position is this: Block 11 as defined by the Court was all the land up to the railway-line. How was the alteration made? It was not made by the Court, because the Assessor was no party to it. What the Supreme Court declared was, that at the time the Court made the order—before the plan was settled at all—Block 11 was ordered to be given to Kemp and Hunia, and went to them as trustees. That is what the Court has found. The words mean, "All assent on the plan." Why is "assent" put there? It is treated on the plan as something given up by them. Had they any authority to give it up? Surely the Court has a right to inquire into that. I submit that is conclusive that this question must be inquired into. This question should be answered for another reason: The proceeding in the Native Court is *in rem*, but once the title is ascertained, once it becomes an English title, as it has become, then these proceedings are *inter parties*, and not *in rem;* and, if so, how can the decree of the Court be valid if the parties are not before the Court? If the parties were present it would bind them. I say now that, if the Court had given a judicial decision that the parties were present—although they were not—and so got jurisdiction, or came to any other decision, the Court would be bound to give *certiorari* against them. I submit the parties were not before the Court, and the Appellate Court has to decide how the original trust was got rid of. The only other point is this: that the Court should answer these questions for this purpose: The Appellate Court sit to hear a claim for this block, but the Appellate Court's jurisdiction is not confined to hearing the claim. It may have a motion of *certiorari* raised before it.

Mr. Justice Denniston: Then it can answer suitable questions.

Sir R. Stout: But your Honour will see that it will save trouble and expense if the questions now put before the Court are dealt with. It will be better than to have further questions and further litigation. The Appellate Court requires certain things for its guidance. I submit the Court should give the Appellate Court guidance as to its power under the Acts I have referred to.

Mr. Justice Conolly: Do I understand you to say that the Court should answer questions which may be important to the Appellate Court in some other matters, although they have nothing to do with the matter under consideration?

Sir R. Stout: No, I do not put it in that way; but my friend says this question is not to be asked because of the nature or form of the question in the Court below. The Horowhenua Block Act gives the Appellate Court all the powers of the Supreme Court.

Mr. Justice Denniston: Mr. Bell's contention is that the Horowhenua Block Act limits the whole of the inquiry in such a way as to render an answer to certain questions unnecessary.

Sir R. Stout: My friend tries to limit it on the ground that, as this is a mere application for a piece of land called trust land, or intended to be trust land, therefore the Court is limited, and is concluded by the certificate issued by the Land Court in 1886.

Mr. Justice Denniston: I do not understand that to be Mr. Bell's contention. Under the Equitable Owners Act you are limited to that.

Mr. Bell: I may be personally misunderstood. Sir Robert Stout seems to suggest that I am opposing the answers to the questions. I am seeking an answer to the Appellate Court that the matters are irrelevant. I said in the Court that I would not put obstacles in the way of answering the questions, but that I would contend the matters were irrelevant. I must not be put personally in the position of seeming to oppose Sir Robert Stout's request to the Court that an answer should be given to those questions which are relevant.

Sir R. Stout: That is my argument to the Court. My friend wants to say that the Appellate Court is limited simply to this question under the Equitable Owners Act. I say, if it be contended that it is limited to that because the application was simply to define the interests of Block 14, I reply that the Appellate Court may set aside the certificate on *certiorari*, and, secondly, the Court will look at the powers of the Court from that point of view, and therefore they are not merely confined to the Equitable Owners Act. My friend brought that forward as if it was conclusive. I have pointed out that if the authorities had thought this Act was sufficient they need not have had a special Act passed at all, because all the Government need have done was to give the jurisdiction under the Act of 1894.

Mr. Bell: But that would not have affected Sir Walter Buller's freehold.

Sir R. Stout: We are not arguing about Sir Walter Buller's land at all; we are dealing with the Natives. I submit, that being so, the reason for the passing of the Act was surely to give greater powers than existed under the Equitable Owners Act, and under section 14 of the Act of 1894.

The Chief Justice: There was no question put to the Court raising the question.

Mr. Bell: Yes; question 17.

The Chief Justice: What we understand by Mr. Bell's contention is that, whatever power a Native would have had in 1886, after the passing of the Equitable Owners Act, to have gone to the Native Land Court and said, "I claim that there was a trust or an intended trust with regard to this particular block of land," and whatever power the Court would have had with regard to the Native complaining, the Appellate Court is to have the same powers with regard to the Horowhenua Block.

Sir R. Stout: And no other powers?

The Chief Justice: Power for the purpose of carrying out its decision, and, supposing they found there was a trust, for the purpose of giving a title. The main object was to give the Appellate Court the power of ascertaining whether there was a trust or an intended trust with regard to this particular piece of land. The trust, Mr. Bell says, was not a trust by construction, but practically an intended trust.

Mr. Bell: Question 16 and question 17 together were intended to raise that question in the argumentative form. The Appellate Court has put in each an argumentative question.

Sir R. Stout: I do not contest the point—that is, assuming that the Court holds that it overrules my contention that the Act declares this to be trust land, and the people are *cestuis que trustent*, as the Act says. I submit that the Act declares this trust land, and the cancellation of the certificates, and the dealings with Sir Walter Buller's land, all show that this is trust land. But, assuming that the Court is against me in the construction of the statute, I submit that the Appellate Court was invested with far greater powers than the Native Court would have had under the Equitable Owners Act, and that the powers granted to it under the sections of the Act to which I have referred give it power to question the validity of the proceedings in the Court of 1886; and if it appears now that the Court of 1886, sitting as a Court, acted without jurisdiction, and therefore could not destroy the existing trust, then the Appellate Court has now the right to say so, and to say that the trust connected with this land has never been destroyed. And that is the power my friend denies. He says, in effect, that the Native Appellate Court may find by evidence—suppose it is proved conclusively to the Court—that a trust existed in this land from 1873 to 1886; the Land Court had no jurisdiction to destroy that trust through the absence of parties and the alteration of the plan, in violation of the Act. Then, I say the Appellate Court has power to say that the trust was never destroyed, and my friend says they have no power to do so. That is the point. If the Horowhenua Block Act did not declare this was trust land, then it gave the Appellate Court ample power to ascertain it. My friend is raising a technical point against the Court doing justice as between the parties.

Mr. Bell: That is not so.

Sir R. Stout: I say the Act was meant to find out what was the truth concerning this block, and my friend's argument is to prevent the Court having jurisdiction to find out the truth.

Mr. Stafford: I do not propose to add anything to my friend Sir Robert Stout's argument.

Mr. Baldwin: Before addressing myself to what I assume is the main question in this case—the question which my friend Mr. Bell has put forward—I would just like to submit to your Honours a few remarks with regard to the reception of evidence in contravention of the Judge's recollection. I have only got this to say: that this, so far as I know and have been able to find out, is the first case in the Native Land Court in which the position Mr. Bell wishes to take up has been assumed. As your Honours know, the very point arose in the question of the Horowhenua Block 11—the case of Warena Hunia against Kemp. Mr. Justice Edwards (who was then counsel) appeared for Major Kemp. He called as a witness to give evidence to this very question Judge Wilson—as to what the Court intended to do. Judge Wilson was cross-examined there, and no objection was made to it. The matter was referred to by the Chief Justice in his judgment, and your Honour weighed the evidence of Judge Wilson on the point as against the evidence of the other witnesses. On page 79, vol. 14, it says,—

"I have not yet referred specifically to the evidence of Mr. Wilson, who acted as Judge at the Court. Unfortunately, he had destroyed the notes he had taken at the hearing of the application for subdivision, but he is clear as to the impression produced upon his mind by what took place in his presence, and that this impression is that the persons interested in consenting to the order to

the two were arranging for something in the nature of a trust and not a beneficial ownership to the two."

Your Honour weighs the evidence as against the evidence of other persons, and comes to the conclusion that Judge Wilson's evidence is entitled to greater credence. Then, Mr. Justice Denniston says, in delivering judgment in the Court of Appeal,—

". . . It is unnecessary to go in detail into the evidence, which has been fully dealt with by the Chief Justice. There is the clear evidence of Mr. Wilson, the Judge of the Court. The evidence of Mr. Macdonald, the main witness for the defence, is inconsistent with the idea of absolute beneficial ownership. Major Kemp admits the existence of the trust, and confirms the evidence of Mr. Wilson as to the circumstances under which the allotment was actually made. . . ."

Your Honour there, far from treating Judge Wilson's evidence as conclusive on the subject, went into the reasons for showing that Judge Wilson's evidence was to be believed, insomuch as the evidence of the other witnesses did not conflict. I submit that the principle contended for by Sir Robert Stout is the correct principle: Wnere a Judge, as an officer of the Court, makes a report to that Court, that that report cannot be contradicted; but when a Judge is tendered as a witness, and gives evidence, then he is subject to cross-examination the same as any other witness. That is all I propose to say with regard to that point. The main point seems to me to be the point raised by Mr. Bell in his argument, and, as I understand his argument, his contention was this: that the whole question is whether the Native Land Court sitting in 1886 intended, under the orders issued at that time, to grant the land in trust to Major Kemp.

The Chief Justice: Or had no intention to give the beneficial ownership to Kemp.

Mr. Baldwin: Yes, your Honour. My friend, Mr. Bell—I do not wish to misconceive him—as I conceive his argument, wishes this Court to compel the Appellate Court to take its stand upon that order made by Judge Wilson, and start its inquiries from that point; and, in connection with that, my friend has a little bit misrepresented—unintentionally, no doubt—the position taken up before the Appellate Court with regard to Block 14. It was never contended before the Appellate Court that the Court could disregard a subdivision of No. 14. But it was contended there that we could contravene Kemp's subdivision 14—it was contended that we could show that, although Kemp had land vested in him under that order in a sense, that although there was such an order, yet that other persons beside Kemp ought rightfully to have been included in the order. There was no suggestion that the order might be met by making Block 14 part of Block 11, but it was submitted that, inasmuch as what is part of Block 14 now was subject to a certain trust the same as Block 11, Kemp ought to hold that portion of 14, at any rate, upon that trust. Before proceeding to deal with the Equitable Owners Act and the Horowhenua Block Act I should like very shortly to mention—because I do not think enough stress has been laid upon it—the position of the title in 1886. The original title was a certificate under section 17 of the Act of 1867, and that was divided by the Native Land Court under the Act of 1882. The land was divided under the Land Division Act of 1882, and the orders issued under that Act had not the effect of commuting the title, or altering the title in any sense, but simply subdivided the land as Native land. The land after these orders were issued stood in exactly the same position as it stood under the certificate of 1867, so far as the fee-simple was concerned.

The Chief Justice: What did the Natives get under the Act of 1882?

Mr. Baldwin: It seems to be an extraordinary thing, but under the Act of 1882 it is not provided what they are to get.

The Chief Justice: What did they get?

Mr. Baldwin: They got a title, undoubtedly, but not under the order. They got a title under the Land Transfer certificate when it was granted.

The Chief Justice: What they got was an order of the Court under the Land Transfer title?

Mr. Baldwin: Yes. Prior to the issue of the certificate of title Kemp got nothing.

The Chief Justice: And what was the certificate of title on?

Mr. Baldwin: The Native Land Court order; but it has been decided that until the actual issue of the certificate he got nothing at all.

The Chief Justice: You say a certificate was issued, and then he got a right to a certificate for something.

Mr. Baldwin: Yes; but it made no change in the legal position of the land—the land remained Native land. On that order he was entitled to a certificate of title, but until a certificate of title was issued his title remained unchanged. But the point I wish to make is, that there has been no change in the title till up to the issue of the certificate.

The Chief Justice: When you are talking about Native-land matters it is best to say Land Transfer certificates.

Mr. Baldwin: I was referring to Land Transfer certificates. No title is vested under these orders in the person in whose favour they were made. I think your Honours will see that it is important in the construction of the Equitable Owners Act to refer to the case in 2, Court of Appeal Reports, page 49. Referring to the Crown Grant Act, on page 49, the judgment of the Court of Appeal, delivered by Judge Arney, is to this effect:—

"The leading provision to be considered—viz., the 26th section of 'The Crown Grants Act, 1866'—applies, it is said, only to Crown lands, and Native lands are not Crown lands. No doubt there is a sense in which Native lands are not Crown lands. The Crown is bound by them, by the common law of England, and by its own solemn engagements to a full recognition of Native proprietary right; whatever the extent of that right by established Native custom appears to be the Crown is bound to respect it. But the fullest measure of respect is consistent with the ascertaining of the technical doctrine that all title to land by English tenure must be derived from the Crown, this of necessity importing that the fee-simple of the territory of New Zealand is vested and resides in the Crown until it be parted with by grant from the Crown."

The point was that this land did not become Crown land until the issue of the certificates. The actual decision in that case was that, if the Crown grants were issued, they validated the leases issued prior to the issue of the Crown grants, but the issue of the Crown grant was what validated them. Until the Crown grants were issued they had no effect at all. Turning to the Horowhenua Block Act, even if we are confined to the narrow construction my friend Mr. Bell puts upon it—that the jurisdiction of the Appellate Court goes no further than the Equitable Owners Act—the Appellate Court, sitting under the Horowhenua Block Act, is entitled to find whether or not a trust exists in connection with this land—not only, as my friend puts it, whether a trust was intended to exist under the order of 1886.

The Chief Justice: You say that the Court has to ascertain whether a trust existed under the order of 1886?

Mr. Baldwin: Mr. Bell's contention is that the Court can only find a trust in the order issued in 1886 by the Native Land Court. I submit that the Appellate Court can go further than that, and can find that Kemp was a trustee on the whole construction of the circumstances, and, if necessary, adopting the position that it is not bound by that order of 1886.

Mr. Justice Conolly: You say that up to 1886 there was a trust, and it is for the other side to show that the trust is divested?

Mr. Baldwin: That is so; and, further, I say, if by any process we can show that this order was granted by the Court without jurisdiction, or was a nullity, and it is also shown that the Natives never intended Kemp to be a beneficial owner, then the Appellate Court is entitled to disregard that order, and find that Kemp is still a trustee under the Equitable Owners Act. Dealing with the preamble in this Act, right away through it draws a distinction between trusts which were intended to exist and trusts which from any reason at all did exist. Your Honours will see that it says,—

"Whereas under 'The Native Land Court Act, 1865' "—that is another point showing that the Equitable Owners Act is confined entirely to grants under the Act of 1865—"certificates of title and Crown grants of certain lands were made in favour of one or two Natives nominally as absolute owners: And whereas in many cases such Natives are only entitled and were only intended to be clothed with title as trustees for themselves and other members of their tribe or hapu or otherwise."

That, I submit, is in favour of persons who are appointed by the Court without any intention of trust at all. In one case the titles are issued to them by the Court without any intention at all in the matter—that is, as absolute owners; in the second case they are issued to them nominally as owners, clearly showing in the preamble that the two cases are contemplated.

Mr. Justice Denniston: You mean to separate these two cases?

Mr. Baldwin: Yes, your Honour.

Mr. Justice Denniston: Is that not straining it?

Mr. Baldwin: I do not think so, your Honour. The words are, "and were only intended to be clothed with title as trustees for themselves and other members of their tribe or hapu or otherwise." Then, section 2 says, "Upon the application of any Native claiming to be beneficially interested in any land as aforesaid the Native Land Court of New Zealand may make inquiry into the nature of the title to such land, and into the existence of any intended trust affecting the title thereto." Well, there was only one nature of title. I submit these words are not to be construed into "nature of title" meaning the sub-title. And then, section 3, I submit, is the keystone of the whole.

The Chief Justice: You have to apply this Act to Block 14. You say it does not mean the title under that order?

Mr. Baldwin: It means the general title to this piece of land. You will see later on that this Act is made applicable to a set of circumstances which it would be difficult to show could have arisen under this particular Act.

Mr. Justice Denniston: The preamble merely shows the reason for enacting it. I suggest to you that your contention involves that you could upset the certificate under the Act of 1867.

Mr. Baldwin: They have found that other persons were entitled to the land.

Mr. Justice Denniston: They have found that that title ought not to have been granted.

Mr. Baldwin: I think not, on this ground: the Court having definitely found, and properly found, as we must assume, because, unless we can show the Court that it was improperly found that Kemp was the beneficial owner, we cannot go behind that order. The point I was attempting to make was that under this Act there are two sets of cases contemplated—there is the case of original title under the Act of 1865, and the case of a derivative title under the Act of 1865. I mean that either the Court could inquire into a trust affecting the piece of land not partitioned under the Act of 1865, or it could inquire into a piece of land which had been partitioned under the Act of 1865. In both cases the title would properly be said to have arisen under the Act of 1865. The illustration is this: Supposing under the Act of 1865 application is made by seven persons to the Native Land Court, who state they were the owners, and ask the Court to award them separate pieces of land, and the Court grants a certificate of title to these seven persons as beneficial owners, according to my friend Mr. Bell's contention it could never be inquired into under the Equitable Owners Act whether these seven persons were trustees or not, because the Native Land Court had not intended them to be trustees at the partition. I submit that must show conclusively that his reading is incorrect. If cases on partition are excluded, then, because the Native Land Court has improperly, and by fraud, been led to make a certain order unintentionally vesting the land in certain persons as beneficial owners, my friend says we are estopped on that point, and that the Native Land Court cannot have any jurisdiction to inquire whether these persons were trustees.

Mr. Justice Denniston: Can you point out where it is suggested that this Act of 1867 can be used?

Mr. Baldwin: I think it can be gathered inferentially. The first is the case of *In re* the Paparoa Block, decided in 11, N.Z. Law Reports, at page 523. I submit that the inference is

clearly that the Native Land Court, sitting under the Act of 1865, and acting on the order made under the Act of 1862, may award this land to these men without any intended trust at all; that there was no intention under the Act of 1865—whatever may have been the intention of the Act of 1862—that there should be any trust at all. I submit it proves this: that where a title under the Act of 1865 was issued to a Native without any intention of the Court to make him a trustee—because there was evidently no intention in this case—that still the Equitable Owners Act would apply.

Mr. Justice Denniston: It found there was no trust.

Mr. Baldwin: No, your Honour. It held that the case was a proper one for the sitting of the Court under the Act of 1865. If Mr. Bell's contention was correct, that case would never have come before the Court. The object of the proceedings commenced in 1862 and completed in 1865 was to show whether it was a case which properly came under the Equitable Owners Act at all.

Mr. Justice Conolly: The only case for the Supreme Court was whether these claims could be heard, or whether this was a case under the Act of 1862; but being under the Act of 1865 it was decided it could be heard. The Crown grant was issued under the Act of 1865.

Mr. Baldwin: Yes, that was the position, your Honour. I quoted that as showing that these are a class of cases which have always been considered by the Native Land Court. I put it to your Honours that these are a class of cases which have been, without any objection apparently, considered under the Equitable Owners Act.

The Chief Justice: What was the nature of the claim?

Mr. Baldwin: It was a claim that certain persons were equitably interested.

The Chief Justice: Upon what grounds?

Mr. Baldwin: There is no statement, your Honour. What I submit, further, is that section 3 shows that that distinction between trusts which were intended to exist and trusts that, as a matter of fact, without any intention, did exist, is a proper distinction to be drawn.

The Chief Justice: What is "existing"?

Mr. Baldwin: Existing by reason of the title, and by reason of all the proceedings which have gone to constitute the title to the block; existing because the person who has been validly constituted a trustee has never ceased to be a trustee.

The Chief Justice: But you cannot say that a trust resulting from a fraud is an intended trust.

Mr. Baldwin: I say "an existing trust." Of course, what my friend Mr. Bell must submit is this: that if trustees, by going to a Court and perpetrating a gross fraud, can get a partition order under the Act of 1865 in their favour, they will stop the Court, under the Equitable Owners Act, from inquiring into it. I shall submit further on, that although there may not have been moral turpitude, what Kemp did did amount to obtaining the order in favour of himself by what was technically a fraud, and, if so, a judgment obtained by fraud is invalid. The other case I wish to quote is *In re* Puke Atua Block, in the same volume, page 729, where the report says, "From the evidence and records it appears that the different steps taken in the Native Land Court in respect to this block were identical with those stated in the report *In re* the Paparoa Block." The power I contend for surely is not a very great power. The power I contend for under the Equitable Owners Act is this: that if a trust was at any time intended to exist, and has not been validly got rid of by a valid judgment of the Court, that then an invalid judgment will not stand in the way of persons holding under an original trust, and that the Court has power to discuss the validity of the judgment. The Act primarily applied to land granted under the Act of 1865 on an original investigation. The main class of cases to which the Act is directed is confined to cases under the Act of 1865; but there are cases other than cases of original investigation under the Act of 1865. No doubt a trust would have to be intended by somebody, either by the Native owners or by the Judge who made the order. I submit there are two cases provided for by this Act—namely, entitled or intended, either by the Court as part of its judicial functions, or intended by the Natives, and their intention carried out by the Court.

Mr. Justice Denniston: I understand the Court put the names on the back of the orders; but the idea and intention was that they should be trustees, and it was afterwards discovered that that interpretation was unsound.

Mr. Baldwin: I think not, your Honour. The decision in the Piripiri Block case seems to show that cases of orders under section 17 of "The Native Land Court Act, 1867," are not under the Act at all. It is a decision of Mr. Justice Richmond's *In re* Piripiri Block, page 629, Vol. 10, N.Z. Law Reports. The headnote is this:—

"Where a certificate of title has been issued after the coming into force of 'The Native Land Act, 1867,' but no persons other than those named in the certificate have been registered as owners, and the certificate contains therefore no reference to the 17th section of the Act of 1867, such certificate is properly describable as issued under 'The Native Lands Act, 1865,' in favour of the Natives named therein as absolute owners."

It is a clear drawing of a distinction by Mr. Justice Richmond between Natives who are absolute owners and persons who are nominally absolute owners. It was a judgment of their Honours the Chief Justice and Mr. Justice Richmond, but it was delivered by Mr. Justice Richmond. He says,—

"We have not here to consider the case of a certificate of title issued under the proviso to section 17 of 'The Native Lands Act, 1867,' and containing, as the Act in such case requires, a recital that it is issued under that section. The question is whether 'The Native Equitable Owners Act, 1886,' can apply to any land the title to which was investigated by the Native Land Court after the coming into operation of 'The Native Lands Act, 1867.' This we answer in the affirmative. The Act of 1867 is an amending Act, and, as such, has to be read with the principal Act. It did not repeal section 23 of 'The Native Land Act, 1865,' which still remained the authority for the issue of certificates of title. It would seem that the Judges of the Native Land

Court had, in fact, put an erroneous interpretation on the reading of section 23, and had acted in issuing certificates as if they were justified in disregarding the existence of rights which were not claimed in Court. To correct this practice, the former part of section 17 expressly requires the Court to ascertain for itself the rights not only of all actual claimants in Court, but of all persons interested. The section then goes on to provide that, in cases where the owners were ascertained to exceed ten in number, a certificate may be issued to not exceeding ten of them, but, in such cases, the names of all the owners must be registered in Court, and the certificate must contain a recital that it is issued under section 17. Under these provisions it is obvious that there is no repeal of section 23 of the Act of 1865, but merely a regulation of the mode under which the power of issuing certificates under the particular Act is to be exercised."

Pausing there for a moment, your Honours will see that the cases of these two Natives as absolute owners are not to be read disjunctively. Their Honours the Chief Justice and Mr. Justice Richmond could not describe such a certificate as made validly to persons nominally as absolute owners. That would be the case of a certificate under section 17, but, as your Honours say,—

"Certificates issued subsequently to the time when the Act of 1867 came into operation are therefore properly describable as issued under 'The Native Lands Act, 1865'; and, where no other persons have been registered as owners but those named in the certificate, and there is accordingly no reference in the certificate to the 17th section of the Act of 1867, such certificates are further describable as made 'in favour of the Natives therein as absolute owners.' Such certificates are, therefore, within the terms of the preamble to 'The Native Equitable Owners Act, 1886.'"

This is a case where there is a registered list on the back. I submit, therefore, your Honours, that this Equitable Owners Act cannot apply to cases under the Act of 1867, but only to cases under the Act of 1865—(*a*) where persons were intended to be trustees by the Court or by the Natives; and (*b*) cases where, as a matter of fact, they actually were, by reason of the circumstances, trustees. I submit that where it is shown that persons are trustees for any reason at all—even if there was no intention under the order of the Court—that still the cases come within this definition.

The Chief Justice: "Intended to be a trustee" must refer to some persons in whose case the intention has not been carried out.

Mr. Baldwin: But my friend Mr. Bell wishes to limit this to the order. I submit the order is not the only thing to be looked at. If a man has once been a trustee, and has not got rid of his trust, there would still be considered to be a trust existing. If it is shown that they were at any time validly intended to be trustees, the fact that there has been an intermediate step in the title which has not had the effect of equitably getting rid of that trust would not avail them.

The Chief Justice: Why not simply say, "Whereas there are Natives who appeared as absolute owners at some time or other"?

Mr. Baldwin: I admit that would be a more proper reading, but I contend that this Act can be properly read as embracing the position I am trying to establish. Take the case of a man who, without any doubt whatever in the matter, was intended both by the Natives and by the Court to be a trustee. Take the case of this man applying for a subdivision of that land, and improperly, by deceiving the Court, obtaining a certificate of title. These persons had been intended to be trustees in the original instance, and surely it would come under the strict wording of "intended trustees." I submit there is an intention, within the meaning of the Act, from what has gone before. So in this case, if there was no arrangement by the original owners that Kemp should have this land himself, and if it was only on the assumption of some such arrangement that Judge Wilson made this order in favour of Kemp, without consulting the owners, the trust so intended would not by a mere invalid interim proceeding be got rid of. I submit that an intended trust might be implied.

The Chief Justice: Your contention is this: We will suppose that in 1886 or 1887 a Native found that he was defeated in getting what he wanted, he himself thinking that the original title was one where he ought to have been admitted as a beneficiary: instead of appealing to the Native Land Court, and instead of going to the Supreme Court to have the title set aside by *certiorari*—instead of doing all these things, he might come under the Equitable Owners Act, and get some redress.

Mr. Baldwin: I submit that would be so in such a class of cases as the present, where the order of the Native Land Court under which he was defeated was obtained under circumstances which rendered it invalid.

The Chief Justice: Where there was no jurisdiction it would be declared invalid.

Mr. Baldwin: I am going to state cases to show that a decision of the Court obtained by fraud is an absolute nullity.

The Chief Justice: The great difficulty is to show that that class of cases was intended to be redressed under the Equitable Owners Act.

Mr. Baldwin: Your Honours will see—I do not know whether your Honours have considered the point—that in this case no harm is done to any one. If Kemp was intended by the equitable owners to have this land, he will still have it—not one particle will be taken away from him. We only say where these irregularities of proceedings of the Court have excluded those who are beneficial owners from their rights they should not be allowed to prevent the Court decreeing a trusteeship.

The Chief Justice: We know that. The question is whether they were intended to be redressed by the Equitable Owners Act.

Mr. Baldwin: What we say is this: Mr. Bell takes up this position: Here is an order in favour of Kemp, made by Judge Wilson. Judge Wilson says he intended to vest the land beneficially in Kemp. Mr. Bell, of course, says, "No matter what you think, no matter what the real facts are, or what may be the justice of the case—proved up to the hilt—no matter whether he has got the land without any right, you are bound hard-and-fast by that order, and, unless by that order there was an intended trust, you are estopped."

Mr. Bell: I must interpose to say that Mr. Baldwin is misinterpreting me. It is a declamatory bit of argument which I must protest against.

Mr. Baldwin: The suggestion made by Mr. Bell is this: that we are estopped by order of the Court from getting at the real facts.

The Chief Justice: The order of the Court vests the title in Kemp.

Mr. Justice Denniston: Mr. Bell has a right to limit the special legislation to what that should be. He says, rightly, that all these questions at one time should have been dealt with, and that a special tribunal has been set up; he not only argues but endeavours to prevent it going beyond the purview of the Act.

Mr. Baldwin: I was not attempting in any way to contravene that, but I said the effect of Mr. Bell's argument would be to estop the inquiry as to who were the real owners, and limit the inquiry to what was the intention of the Court at the time the order was made.

The Chief Justice: I do not think I observed that. Mr. Bell said that the Appellate Court could not ascertain whether there was a voluntary arrangement with regard to Block 14—that Kemp should have it or not.

Mr. Baldwin: I took a very careful note of Mr. Bell's argument, and the question was submitted whether the Native Land Court intended to grant a trust; and he is not prepared to deny that if all the Natives intended a trust, and the Judge had no intention——

The Chief Justice: He stated there might be a trust. Although the Court had blundered, the Appellate Court could go into that.

Mr. Baldwin: He stated that, well knowing that, as appears on the case, the Judge stated he had an intention. I will not labour it any further, but my point is this: whether the Judge's intention could avail when it was an intention brought about by misstatements as to this voluntary arrangement.

Mr. Bell: I said I am not prepared to deny that the Natives outside the Court, amongst themselves, agreed to a trust, and the Court might inquire into the circumstances under which that order was made independent of the mere intention of the Court; but I said, if the Court had an intention, and it was not misled, then it was the intention of the Court.

Mr. Baldwin: If my friend admits that, if we can show that the Court was misled in making the order it did—if the Appellate Court was misled, in fact—then we are entitled to go behind the order.

The Chief Justice: Mr. Bell's contention is that you must not question whether or not there was a voluntary arrangement within the meaning of the Act—that is, whether it was arrived at by the necessary persons. As I understand, it may be said that, supposing the evidence shows that the voluntary arrangement acted upon by the Court was that Kemp was to be a trustee, then that matter can be gone into, although this title appears on its face.

Mr. Bell: That is exactly what we mean, your Honour. The question, we say, for the Court is: How did the certificate for Block 14 come to be issued, and was that intended to be a trust or not? and the question is not whether, by reason of some circumstances which affected the intention of the Court with regard to the 52,000 acres, or some question which affected all the blocks together, an abstruse doctrine of law might constitute a legal trusteeship. The question is one of fact with regard to this particular order, and, if the Court intended to make it a trust, or acted upon a voluntary arrangement, the effect of which was that it was a trust, then the Court, under the Equitable Owners Act, is entitled to make the order.

Mr. Baldwin: My friend says this: If the evidence in the Appellate Court proves that there was no such voluntary arrangement——

The Chief Justice: That is your argument; but Mr. Bell's point is that you cannot go beyond the voluntary arrangement.

Mr. Baldwin: Your Honours will see the difficulty of that position. I understand now that if, as a matter of fact, it is proved in the Appellate Court that there was no voluntary arrangement to give this land to Kemp, and that the Court awarded it on the assumption that there was, then the order of the Court will not exclude the Appellate Court from arguing the point.

Mr. Bell: That is absolutely and precisely the point I did not intend, as Mr. Baldwin has stated, for it is exactly contrary to what I have argued in this Court.

Mr. Justice Denniston: Mr. Bell has started with the assumption that there was a voluntary arrangement. You want to say it was not a voluntary arrangement.

Mr. Baldwin: What I meant to say was this: There are two contentions open to us—First, there was no order, because there was no voluntary arrangement as contemplated by the statute, whatever the judgment might be on the subject; and, second, if there was a voluntary arrangement, there was no part of that voluntary arrangement to give the land to Kemp, and if it was given to him, and the Court made the order accordingly, then the order is invalid. That is the argument I am addressing to your Honours. I will put this further point: Supposing there are 143 owners, as there are in this block; ten or twelve of these persons attend the Court, and one of these persons is a person of paramount authority over the others, and induces the others to acquiesce in what he says, and appears in Court (well knowing that the arrangement is his own, acquiesced in by these ten or twelve persons) and informs the Judge that there is a voluntary arrangement among the whole of the owners of the tribe that a certain thing is to be done, and persuades the Judge that there is a voluntary arrangement, when he perfectly well knows that there is no arrangement, and no other acquiescence than that of a few members on his own proposition. On my friend's contention that order was made in accordance with the facts, and the order may be good——

Mr. Bell: I submit Mr. Baldwin is not putting the case fairly.

Mr. Justice Denniston: The assumption is that Kemp assumed that all the persons were parties to the claims.

Mr. Baldwin: Yes, your Honour.

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.

Mr. Baldwin: Yes, your Honour, after the order was determined by the Court, as bound by the case.

The Chief Justice: That does not affect the validity of the order.

Mr. Baldwin: Yes, your Honour, I submit it does, if they carried it out without complying with the statutory requirements.

The Chief Justice: Do I understand that you say that this allocation was before the order was sealed?

Mr. Baldwin: The alteration was before the order was sealed.

Sir R. Stout: But it was not made with the consent of the Court.

Mr. Baldwin: The statute shows that the plan had to be indorsed on the order prior to the order being signed and sealed.

The Chief Justice: Was that done?

Mr. Baldwin: Yes. On paragraph 5 of the case it says,—

"The Court opened on the 25th November, 1886, and made three divisions in favour of Meiha Keepa for the following purpose, viz.: No. 1, for the railway-line (76 acres); No. 2, for sale to the Government (4,000 acres); No. 3 (1,200 acres), for the descendants of Te Whatanui who were not amongst the registered owners, to enable an arrangement for the settlement of tribal quarrels, made in 1874 between Sir Donald McLean and Meiha Keepa, to be fulfilled (*vide* agreement of 11th February, 1874, No. 6 in schedule annexed hereto). This parcel of land, then numbered 3, but subsequently designated No. 14, was laid off along the southern boundary of the block, and to the east of the railway, and throughout the evidence given before the Appellate Court it is referred to as the block of 1,200 acres laid off at Ohau, and by some of the witnesses as Papaitonga, but the latter name has become associated with it in consequence of the alteration made in the position of part of the said subdivision after it had become designated as 14. The orders for the above-mentioned parcels of land were pronounced in Court on the 25th November, 1886, in favour of Meiha Keepa te Rangihiwinui, to be held by him for the aforesaid purposes; and a minute thereof was made in the records of the Court, and the fees paid, but the orders were not drawn up or signed or sealed."

The Chief Justice: The orders were not drawn up or sealed?

Mr. Baldwin: I do not think the case finds when the orders were sealed.

Sir R. Stout: You will see paragraph 15 refers to that matter about the plan.

The Chief Justice: I do not see anywhere the circumstances under which these were sealed. It appears on the face of it that they ought to have been sealed in November.

Mr. Baldwin: If that were so they would be bad on the face of them, on the ground that the provision as to certificate had not been complied with. If it is found that this order is invalid by reason of matter of this sort, and the effect of the order as it stands would be to prevent the rightful people from getting the land, then it would be invalid.

Sir R. Stout: It appears that the plan was not assented to until the 10th August, 1887.

Mr. Baldwin: The surveyor seems to have made and signed the plan on the 10th September, 1887.

Mr. Bell: We do not want to have any technical questions raised about this. We must admit that the plan of each subdivision was on the order before being signed and sealed.

Mr. Baldwin: We say that the order was not signed and sealed until after this amended plan had been made in September.

Mr. Bell: I do not want to have any question raised as to this. The plan of each subdivision was on the back of the order before it was signed and sealed.

Mr. Baldwin: The Court has to exhibit the plan, in order to enable persons to make objections, and if no persons make objections then the title is signed. Judge Wilson was quite wrong in assuming that the same Assessor should approve of what was done. According to the Act, it must be "an Assessor"; and there is this further point in connection with this: that Judge Wilson is unable to say then (I do not say he wants to say) that No. 11 was a trust block. It is quite clear that it was trust land—that this was land belonging to certain *cestuis que trustent*, which was being given away to one trustee—to Major Kemp. The position of these persons—Kemp and Warena Hunia—was clearly defined in connection with No. 11 by the Court of Appeal. Your Honours said this, on page 95, Vol. 14, N.Z. Law Reports: "The trustees held the land for the parties in whom and to the extent to which the property in the land was before the allotment—that is, for the Natives who, but for their consent to the allotment, would have had their rights ascertained and defined by the Land Court." On page 94 your Honours say, "The conclusion we come to is that the land was conveyed to Kemp and Hunia on the understanding that they were to hold it for the benefit of all the members of the tribe according to Maori custom; that the main object was to prevent alienation by any individual member; and that the land was to be administered very much on the principles on which the property of a tribe was held and dealt with before the introduction of English law." And this land is a considerable portion of what these people said should be given to Warena Hunia and Kemp. Mr. Justice Denniston, in the Appeal Court, says conclusively that the railway-line was the line of demarcation, and that the whole point was the subdivision lying to the eastward.

Mr. Bell: The railway did not exist then.

Mr. Baldwin: The whole discrepancy is made up within this very block.

Mr. Justice Denniston: Was it not a rough delimitation of the whole thing?

Mr. Baldwin: No, your Honour. I submit that No. 11 was very emphatically a question of position. The other blocks were a matter of acreage, but No. 12 was the residuum of what was left. If it had been a judicial determination I could admit that your Honour's suggestion could apply. This is a case where the Court says we are trying to do what the parties have agreed amongst themselves should be done. We submit it was conclusively proved that No. 11 had nothing to do withthe acreage—that it was all the land, with little exception, lying to the westward of the railway-line. At the end of paragraph 15 it says,—

"At the time when the minutes for the orders Nos. 11 and 14 were made, on the 1st and 3rd December, 1886, respectively, the purport of the order made for No. 11 was for the whole of the land not otherwise appropriated between the sea and the railway, as shown upon the plan forwarded to the Survey Department, comprising an approximate area of 15,207 acres. The position of No. 14 was originally fixed to the eastward of the railway-line, but on the survey being made it was found that the area to the eastward of the railway-line was insufficient by 589 acres to provide for the whole of the quantity required; an alteration was therefore made which resulted in 589 acres 1 rood 38 perches being taken out of No. 11 to make up the quantity required for No. 14. The area of No. 11, found on survey, now comprises 14,975 acres."

There were two small pieces of land which had been appropriated, and it is minuted "Purported to be a voluntary arrangement of the parties." All we are complaining of is that the Native Land Court, well knowing our interest in the matter, without giving us any opportunity of objecting, took away 600 acres of our land—part of the lake—and handed it over to Kemp. If this Court holds that the order for No. 14 can be quashed on the ground of mistake, it will be open for the Appellate Court to treat it as if not made, and to consider whether or not, on a proper consideration of the evidence, Major Kemp alone should have the piece of land to the westward of the railway-line, or whether Kemp with the other persons should have it. My friend Sir Robert Stout points out that question 9 specifically deals with that. I am not dealing with that point specifically now, but that is another case where we are entitled to go behind the order.

Mr. Justice Denniston: What about No. 6 under the Act?

Mr. Baldwin: We say it is a trust section; but if it were contended by Kemp that this was his own land under the order it would be open to the persons interested in this to suggest——

Mr. Justice Denniston: It was meant that 600 acres should come out of somewhere.

Mr. Baldwin: I submit it might have come out in two different ways. It might have been provided for by a rateable abatement of all the sections to the eastward of the railway-line, or it might have come out—and properly so—of No. 12.

Mr. Justice Denniston: You rely upon a different boundary having been mentioned—the railway-line. It must have been a fixture.

Mr. Baldwin: Yes, your Honour.

Mr. Justice Denniston: But it was not quite a fixture?

Mr. Baldwin: It was the railway-line, because we find that substantially the whole of the land lies to the eastward. The tribe suffers in a piece of land in which it is not particularly interested.

Mr. Justice Denniston: It is all trust land. The same objection would arise all round. You say 1,200 acres must be found: the same principle would apply, for you would have to trench upon trust property in some way.

Mr. Baldwin: If the people had been consulted they would probably have said, "That is the land we gave to you." The point I am dealing with is that the fact that it comes out of the very best of the land, and is given to one of the trustees, does not leave it open to this trustee to complain. Your Honours will remember that the tribe thought they had reserved all the land to the westward, and I say, if they had given anything at all, it was the land to the eastward of the railway-line. No. 12 is a "balance block," and, being so, what hardship can there be in the land coming out of that, if it is only a "balance block"? That is practically the whole of my argument on this point: that whether we can show that this order was not an order of the Court on the ground that it is made without jurisdiction, or that the Court was deceived in making it, or for any other reason, I submit that the order will not stand in the way of an intended trust which appeared to be given effect to in previous proceedings. And in that connection I would like shortly to refer to what your Honours put to me this morning—that perhaps the Court would have been entitled to go behind the certificate of 1867. I submit that they would have been so entitled if any Native could have shown that it was intended at the time—namely, 1873—that the land was to be held in trust for them as well as for others. That would not apply generally under the Equitable Owners Act, because it would require special legislation to bring any land-titles under that section within the provisions of the Equitable Owners Act. The decision in the Piripiri Block seems to have shown that land under section 17 does not come within the Equitable Owners Act. It is only when that Act is made to apply to it, as in this case, that the point would arise. Another point is this: Dealing with the Horowhenua Block Act, my friend Mr. Bell's contention is this (as I understand it): that this order made by Judge Wilson to Kemp bars—that is to say, unless we can show that under that order he is intended to be a trustee, that we are bound by that order. I submit that, if it can be shown outside the order that Kemp is only the legal owner, and that persons are beneficially entitled, then, under section 14 of the Horowhenua Block Act, this Court is entitled to disregard that order. Section 14 of the Act says, "All Orders in Council, judgments, decrees, or orders whatsoever now or at any time hereafter affecting the said block shall, so far as they conflict with the provisions of this Act, be void and of no effect." I submit the governing words in this Horowhenua Block Act are the opening words in section 4—"To enable *cestuis que trustent* to become certificated owners of certain portions of the said block." For that purpose the Equitable Owners Act is re-enacted, and for that purpose the Court gets wide powers under the Native Land Court Act, and if any order conflicts with it that order must be disregarded—that is to say, where the order acts, as it were, as an estoppel, and prevents the Appellate Court getting at the truth of the matter from the real beneficial owners of the land.

Mr. Justice Denniston: They are to treat them as non-existent, so far as they are contrary to its opinions—that is to say, if the Court finds them in the way it may ignore them?

Mr. Baldwin: Yes, your Honour. That is to say, substantial justice in the way of enabling beneficial owners to become entitled. The only other point is just one observation I wish to make on the construction of section 15. As Sir Robert Stout has dealt with that very fully I do not pro-

pose to labour the point, but your Honours will see that it says: "For the purpose of carrying out the provisions of this Act, the Court shall have and may exercise, as the nature of the case requires, in addition to the special powers hereby conferred, all the powers and jurisdiction of the Court under 'The Native Land Court Act, 1894,' and 'The Native Land Laws Amendment Act, 1895.'" Mr. Bell would leave out altogether those words "in addition." I submit that conclusively points to only one thing in the Native Land Laws Amendment Act, and that is the portion quoted by my friend Sir Robert Stout—sections 58 and 59. They are headed "Jurisdiction," and they are the only sections in that Act dealing with the jurisdiction of the Court or its powers. I wish only to say, in conclusion, that there is another case I should have cited this morning with regard to Crown titles vesting only on issue of the Crown grant, and that is the case of Tully *v.* Ngatuere in No. 2, Court of Appeal, page 446.

The Chief Justice: We think, Mr. Bell, that, on the whole, without expressing any indication as to whether we feel any doubt or no doubt about this question, you had better go on with your argument as though there had been no interruption, and take the opportunity of replying to what has been said on the other side.

Mr. Bell: I should have desired to address your Honours still further upon this matter in my reply. Upon the question as to the meaning of the Horowhenua Block Act and the Native Equitable Owners Act, and as to the arguments addressed by my friends to your Honours upon the construction of that Act, I wish to refer—as I was referring when the Court stopped me—to the fact that section 15 of the Horowhenua Block Act says that it is only "for the purpose of carrying out the provisions of this Act the Court shall have and may exercise, as the nature of the case requires, in addition to the special powers hereby conferred, all the powers and jurisdiction of the Court." My friends have suggested that there is no other special power except the power under the Equitable Owners Act, but there is a special power in section 4 which is intended, it is submitted, to apply:—

"In exercising jurisdiction under this section the Court shall deal with the claims of the forty-eight persons named in the Second Schedule as if their names had been included in the list of persons registered under the provisions of the seventeenth section of 'The Native Lands Act, 1867,' as specified in Schedule Six hereto, as the owners of the said block, and may also limit the interest of, or wholly omit from any order made under the provisions of this Act the name of, any person who, having been found to be a trustee, has, to the prejudice of the interests of the other owners, or any of them, assumed the position of an absolute owner in respect to any former sale or disposition of any portion or portions of the said block."

That is to say, they may strike any one out of Block 11 whom they find to have acted to the detriment of Block 14, or *vice versâ*. That is the special power.

The Chief Justice: That is, in addition?

Mr. Bell: Yes; but, still, only "for the purpose of carrying out the provisions of this Act." My friends have ignored those words, I submit. They say that the words "in addition" practically abrogate the words "for the purpose of carrying out the provisions of this Act." My friends put it to the Court that I made the omission, whereas I submit they themselves make the omission. To interpret clause 15 as more than supplementing the Equitable Owners Act is to say that a Court sitting under that Act is to have a roving commission to root up the whole procedure of the original Court of investigation, for the purpose—not of ascertaining whether it was intended or not intended to be a trust, but for the purpose of ascertaining whether by some blunder of the Court the proceedings were irregular or informal—for the purpose of treating the original investigations as nullities, as my friends would put it, and therefore of leaving the whole matter at large. I am going outside the Horowhenua Block Act altogether. What we ask the Court to decide is the meaning of the Native Equitable Owners Act. The Act of 1886 gave power to the Court only: "Upon the application of any Native claiming to be beneficially interested in any land as aforesaid, the Native Land Court of New Zealand may make inquiry into the nature of the title of such land, and into the existence of any intended trust affecting the title thereto"; and we submit to your Honours that the question put from the Bench to my friends can only be answered in one way. If what they contend for is the jurisdiction of the Native Land Court sitting under the Equitable Owners Act, then that Court, under the Act of 1886, was for all purposes a Court of review of the procedure of every block in the Native Land Act. That is what their argument leads to. The case was put to my friends by one of your Honours that a person says, "I was beneficially interested in the block. The block came before the Court, and the Court excluded me; but even in giving the land to the tribe which excluded me and refusing the award in favour of the tribe which included me, the Court proceeded to its determination upon a plan which was not in accordance with its award. Therefore, I, the person interested, declare that these people so found that these people were trustees for me, I being a beneficial owner." Then, it may be said that their argument should be limited in its application to cases where, as here, the title began with the investigation under section 17 of the Act of 1867, so that a *quasi*-trusteeship of a kind was created in the inception. But if a block of that kind has been divided—I wish to leave the Horowhenua Block out of the question altogether—into different subdivisions, and a Native comes along and says, "I am beneficially interested in Lot 10," the subdivision having taken place ten years ago, and he goes to the Court and alleges, not an intended trust of 10, but irregularities or informalities on the subdivision which entitled him to show that he was a *cestui que trust* to the persons to whom the certificate originally issued, and therefore leading to a beneficial interest in 10, he proves it by defining it as a beneficial interest in the block which was so subdivided into the ten parts. I venture to submit that that is not the meaning of the Equitable Owners Act. Our point is this, and logic must prove it: that the grievance must be an intended trust in respect of the subdivision, and could not be in respect of the block out of which the subdivision was carved. Every allegation that is made here—every single allegation, with the one exception which we admit is open to the Appellate Court—entitles these people to claim an interest in every other block and every other subdivision; every single point except one—namely, that there was not a sufficient

area of land, and that Block 14 was left to the end, and so did not come within the compass of what was spoken of before. But every matter which is here referred to by the Native Appellate Court, except the shifting of the boundary, is matter which entitles the person complaining not only to be admitted as a *cestui que trust* of No. 14, but of Nos. 1 and 2. Now, is that the meaning of the Horowhenua Block Act? Is not the meaning, if you look at the Act, this: that the grievances which are to be investigated are grievances relating to this subdivision only? Did the Act intend to practically gather grievances referring to the 52,000 acres and concentrate them on this 1,200 acres? If it did so, it does not say so. We submit the terms giving jurisdiction and excluding jurisdiction are a revival for the purposes of this Act, and not otherwise, of section 3 of the Equitable Owners Act, and this section 4 was to enable the *cestuis que trustent*—not persons who have a mere right, but persons entitled as the *cestuis que trustent*—to become certificated owners of certain portions of the said block. Section 14, among others, comes under this section. That is the only jurisdiction conferred, except the jurisdiction which is admitted as plainly necessary under section 15. My friend Sir Robert Stout has contended that from the destruction in section 5 of the Land Transfer certificates the Court will construe this as itself declaring these blocks to be blocks held upon trust. But of course, your Honours, there are obvious reasons why that destruction was effected. In the first place, that is required for the practice of the Land Transfer Office; secondly, it was necessary to destroy the certificate for the purpose of enabling proof to be given of notice to Sir Walter Buller, because the Land Transfer Act would have rendered the whole thing nugatory if the Land Transfer certificate still existed, because the Act provides that notice of a trust does not prevent dealings, but it is intended that you should have the right to deal with a trustee under the Act. So long as you deal *bonâ fide* and for value the title passes. The effect of the Land Transfer Act on the question intended to be tried in the Supreme Court under section 10 was, of course, obvious to the draftsman.

Sir R. Stout: But the statute not only set aside the registration, but set aside the title. He only had 1,100 acres of freehold.

Mr. Bell: Yes, it set aside a registered lease of his for twenty-one years. That registered lease, but for this, would have remained good, because he would have taken the lease to which he was entitled. We take a lease under the Land Transfer Act without any risk.

Sir R. Stout: My point is, that not only the dealings but the certificates are set aside. Paragraph 5 will show the existing certificates and all the dealings.

Mr. Bell: Sir Walter Buller would say he took the land under the certificate of title, and it did not matter whether his lessor had the title or not. I submit that is obvious on the face of the statute. Then, again, the object of destroying the certificates for Section 11, which had already been declared to be a trust block, and Section 6, which was admitted on all hands to be a trust block, was obvious enough, and there was no reason why you should not include Section 14 when the Supreme Court has to re-establish the European owner, and when the Court was to sit and inquire whether any one else than the nominal owner was the person entitled to the land. But the destruction of the certificates does not seem, so far as I can see, to offer any reason, one way or the other, for the construction of the statute. But if the intention of the statute was to destroy the title, to declare that Section 14 was a trust estate, and to simply direct the ascertainment of the *cestuis que trustent*, then it is a very badly expressed statute. My friends contended in the Supreme Court that the titles were not destroyed. We submit on that point that the statute leaves the question to the Appellate Court whether or not, within the meaning of the Equitable Owners Act, there was an intended trust of Block 14, and for the purpose of avoiding any technical question it destroyed the certificate. If Kemp is already a trustee, I do not know what I am doing here, or what he is doing in the Appellate Court, except as one of the persons to divide the spoil: and he does not assert himself to be one of those persons. If this is a trust block, and he is a trustee, it is ludicrous to suggest that he was a trustee for himself alone. He certainly does not assert that position, and, as far as I know, it has never been asserted against him. With regard to another point raised by my friend Sir Robert Stout, he submitted that they were not confined within the four corners of the Equitable Owners Act He said, the Land Transfer certificates being set aside, then the title is open; and, as I understood it, that therefore the Appellate Court, quite apart from section 15, would have, in exercising any function, a roving commission, the title now being the Native title, to ascertain who were the persons beneficially entitled to the land—or, rather, who ought to have been found in 1886 to be the persons beneficially entitled. But can it be supposed that the Legislature intended such a process as that it should not apply to Sections 6, 11, and 12, and be limited to Section 14? What reason can be suggested for limiting that process to one out of the fourteen blocks? Assuming that the Legislature was proceeding to deal with matters affecting the whole 52,000 acres, why should these sections be singled out for that purpose?

Mr. Justice Denniston: No. 2 is a trust.

Mr. Bell: What I mean is that I can understand the interpretation of the Act which says there are special reasons why the Court should ascertain if Block 14 is a trust block. On the other hand, my friend suggests that the same applies to Section 2 as well as to Section 14—that is, irregularities with regard to 1886 that affected not Section 14, but the 52,000 acres. They therefore throw open the whole matter for this roving body to deal with. One might see why there might be a reason for it in the mind of the draftsman. I am assuming that the Legislature is supposed to proceed on some fair ground upon such a matter.

Sir R. Stout: My friend knows that Sections 1 and 2 have been sold.

Mr. Bell: Portions of No. 14 have been sold, and the whole of it has been leased. Those people who bought the township might have known about these matters. I understand it has been said that we all ought to have read all the minutes. What we repeat, in answer to Mr. Baldwin's argument, is that all he suggests, equally with what Sir Robert Stout suggests, except one point as to the shifting of Block 14, is applicable to every other subdivision. That is, an answer to

question 15 in the affirmative would mean that an inquiry under the Equitable Owners Act is not an inquiry into what was contemplated, but into a strictly legal matter, as to whether the Court proceeded according to statute or not, with the result that, if not, the peculiar result which would follow of a *quasi*-quashing of all the titles on proceedings equivalent to *certiorari*. That, I understand, closes the argument on question 15. All sides have been heard on 16 and 17, and I understand it is not open to my friends to refer to those questions again. I should like to reply, with your permission, to the questions concerning Judge Wilson, in order to close that part of the case. I still submit that if what occurred before him is clear in his recollection, that is conclusive and exclusive. Your Honours know that no case has been shown questioning the authority of Rex *v.* Grant. It was suggested by the Chief Justice that it was a rule of practice. I submit that could not be so. That was a motion in a criminal case for a new trial, and it was an undoubted fact that the counsel on both sides and the shorthand-writer agreed that a certain course had been taken, and they offered to prove it. The question is not whether the Judge's statement is paramount evidence, but whether it is exclusive. If it is a rule of practice, then the Court ought to refuse affidavits, and say, "We shall accept the Judge's statement against everybody." If the Judge is there, and his recollection is clear, then the affidavits will not be allowed to be filed. That is our answer to the peculiar form in which question 14 has been put, and our answer to my friend's argument upon it. What we say is that, if the evidence manifestly appears against the record, then we admit the record will prevail; but, if "manifestly" means manifest by other evidence, we say you cannot call that evidence, and therefore it cannot manifestly appear. If you are going to call the evidence of a Judge, you ought, as in this case, to take it first. Having got the recollection of the Judge, then nothing manifestly can appear against it, if the rule is a correct one which is laid down in Rex *v.* Grant. It appears to me, and I submit to the Court, that, curious as it seems, there should be a kind of conclusiveness in it; and, unquestionably, it is conclusive in the case of a report from a Judge appealed from, and the reason for the Court adhering to it is, we submit, better than the obvious reason that can be given against it. It is obvious, as the Chief Justice said in Hapuka *v.* Smith, that if the evidence is overwhelming against the Judge, then, unpleasant as it may be, you ought to accept it if you admit it. If a Judge says, speaking of a matter before him, that such-and-such a thing did occur, and that his recollection is clear upon it, then unpleasantness is avoided if, as laid down in Rex *v.* Grant, you treat his evidence as conclusive and do not allow it to be contravened.

Mr. Justice Denniston: And he should not be cross-examined?

Mr. Bell: I know there is the case of Lord Penzance, where he was called and sworn.

Mr. Justice Denniston: Should he have been sworn, from your point of view?

Mr. Bell: I am not quite sure. I saw the case, but I am so uncertain about the events that I could not speak to it. However, that is the position we submit. The case to which his Honour the Chief Justice referred is the case of Buccleugh *v.* The Metropolitan Board of Works, in 5 Law Reports, House of Lords, page 418, and this question is discussed at very considerable length. I do not propose to read each of the opinions, but perhaps I may read Lord Cairns's with regard to the acceptance of the evidence. Lord Blackburn's opinion is in Law Reports, 5 Exchequer, page 247; and I say that because Lord Blackburn says that, inasmuch as he gave his opinion at length in the Exchequer Court, he would not repeat it in the House of Lords. The point I make is this: that up to the point of giving evidence as to what was the subject-matter of the adjudication the Judge or the arbitrator might be a witness, but for the purpose of saying what was done before him sitting as a Judge if a dispute arises, or what he intended to do, then, if his opinion is asked and he gives it, that is conclusive. For instance, my friend reads from the judgment of Lord Mansfield, and says that the matter can be proved by a note of counsel. That is a good illustration. So it can; but it cannot be proved, nor will counsel's note be read, if the Judge's recollection is clear. It would be quite the same as if Sir Robert Stout and I differed as to what had been said by your Honour, and we were allowed to file affidavits, supposing your Honour's recollection was clear. What might happen here is that, in respect of matters which happened in 1886, a number of documents might be produced and pieced together. They are not records, and yet they might be used by a Court to countervail the clear recollection of a Judge. That is what is suggested in the case. Very well; that may happen in this Court, or in any other Court. The question is, what, having regard to the proper regulation of Courts, is and should be the principle in such matters; and we submit, in regard to the proper regulation in Courts, the practice is laid down in Rex *v.* Grant; and it must be more than a rule of practice, because that was a criminal case, and it is stated, not that the affidavits cannot be used to countervail, but that they cannot be filed at all to contravene. That is the point. With regard to the point of my friend, with regard to the County Court rule showing that it is a rule of practice, the rule of practice is not the rule authorising the Judge's note to be given, but saying that where the Judge's recollection is not clear, where there is no note, there you may read the note of counsel. That is not making it a rule of practice.

Sir R. Stout: Rule 58 deals with the Supreme Court.

Mr. Bell: The rule of practice is to permit matter being used where you have not the Judge's note, but it is not the rule of practice to contravene the Judge's note. If this Court was sitting on a rehearing from a Magistrate of a question of fact, not on an appeal on a question of law, but for a new trial, and the question arose whether at a particular time or on a particular day counsel had raised a particular objection to the reception of particular evidence, would not the Court be bound by the statement of the Magistrate in contravention to any number of documents to the contrary? I know of no case where that has not been done. Nobody supposes that counsel would say, "You have got the Magistrate's report, and we are going to file affidavits to contravene it."

The Chief Justice: I remember a case where an application was made for a mandamus to compel the Magistrate to state what the counsel had said in the case, but which did not appear in the statement of the case. I do not think we came to a decision, but I rather thought, under such

circumstances, that I had to consider whether he was compellable to state what appeared to be the fact, although he had not stated it in the case.

Mr. Bell: I can quite understand that he could be compelled to say what was or what was not the fact.

The Chief Justice: I believe in the end we avoided the difficulty.

Mr. Bell: I say, in Rex *v.* Grant, that Lord Denman was as wrong as he could be. There are two counsel and the shorthand-writer against him; but Lord Denman's recollection was just the other way. It was quite possible and probable that Lord Denman was absolutely wrong, and that the point ought to have been admitted. But go further and say that half a dozen other shorthand-writers had all agreed upon the point, still the principle is that the oath ought not to be admitted if the Judge's recollection is clear. And I submit there is greater reason for applying the rule here, where you may have a Judge of the Native Land Court dealing with another Judge of the Native Land Court, for a difficulty might occur which certainly would not occur in the Supreme Court, and it is quite obvious that that is so.

The Chief Justice: The Magistrate in the case I mention, in giving his verdict, used expressions which tended to show he had taken wrong matter into consideration. That was the ground for a new trial. The case was stated, and he would not state it in any other way. He left out that part of the verdict, and, as the minute did not show that it was part of the verdict, but was only a general summary, it was contended by the other side that he had stated as part of his verdict and had taken into account a wrong matter, and that, as it was a matter of law, he could not take it into account in giving his verdict. That was the point. There was a mandamus applied for, and affidavits put in on both sides, and in the end I think it was settled.

Mr. Bell: He might be compelled to say, possibly, what he had said; but, supposing he reports to the Court that he did not use the words alleged, is the Court going to determine then upon the affidavits against the Magistrate? That is the very illustration of the position, and I submit the Court ought not to do so.

The Chief Justice: Why not?

Mr. Bell: Because of the recent ruling I have suggested.

The Chief Justice: The difficulty is that there is such a rule.

Mr. Bell: But it was the ground upon which the case of Rex *v.* Grant was decided. However, I will just leave it there. The question will arise again some day or other. In the case of Coles and Bullman, reported in the Law Journal, the Court decided that the use of affidavits to correct the Secondary's notes could not be allowed. It is a new point, but, I submit, a point of very considerable importance, and, although it has been decided without argument in Hapuku *v.* Smith, still, I submit, it is still open to the Supreme Court to settle. The observations in that case show how reluctant the Court would be to be driven to act upon evidence contravening the memory of the Judge. Surely it is much more convenient and proper to do as, we submit, the cases show that the Courts of England do—decide that if you have the direction of the Judge you cannot contravene it.

Sir R. Stout: The direction may be wrong. Under Rule 58 three cases are referred to in the notes, and in those cases it appears that the Court is not confined to the Judge's notes.

Mr. Bell: I understand that the argument is now closed on questions 14, 14A, 15, 16, and 17, inclusive. Question 17, of course, requires a definitive reply apart from the general answer.

The Chief Justice: The question is put in this way: "Is not the Appellate Court, in coming to such a decision, entitled to disregard any of the proceedings in the Court of 1886?" In saying, "entitled to disregard," they mean "not bound by."

Mr. Bell: What they mean is this: "Are we not, under section 15 of the Horowhenua Block Act, absolutely at large, in exercising all our jurisdiction, to roam over the whole ground."

Sir R. Stout: We do not say that is so.

Mr. Baldwin: I may say that I am responsible for that question. With regard to all these questions, a great many were submitted by counsel on both sides. The words mean "not estopped."

The Chief Justice: They mean, notwithstanding the evidence of Judge Wilson.

Mr. Bell: That is not so. They began by question No. 16: "Is it not a matter for decision by the Appellate Court, under 'The Horowhenua Block Act, 1896,' whether it was validly agreed to at or before the subdivision or Court of 1886 by the persons whose consent was necessary that Major Kemp should be the sole owner of the piece of land now Horowhenua No. 14; and is not the Appellate Court, in coming to such decision, entitled to disregard any of the proceedings in the Court of 1886, and any matters or things in pursuance thereof?"

What we put to the Court is that the answer to question 17, whatever happens to the others, is "No."

The Chief Justice: We may be able to give some answers which may not be very satisfactory to the Court.

Mr. Bell: Surely we have a right to say the Court is bound by an answer which your Honours give. The answer, either for or against us, at all events, should be such as to bind the Court.

The Chief Justice: Of course.

Mr. Bell: Question 18 is a question on which the argument is not closed. I understand that questions 14 to 17 inclusive are closed so far as argument is concerned. Now I begin the argument on question 18. That is a very simple question, on which I need not delay your Honours, and is properly put. It is a question arising on the last words of section 4 of the Horowhenua Block Act. It says,—

"Can the Court, exercising jurisdiction under section 4 of 'The Horowhenua Block Act, 1896,' limit the interest of, or wholly omit from an order made, any person, unless it finds such person to have been a trustee, and, while a trustee, to have acted to the prejudice of the interests of the other owners? Are the concluding six words of section 4 to be construed as limited to reasons *ejusdem generis* with those specifically stated?"

The question is whether the words "unless it finds such person to have been a trustee," govern what follows. It is suggested that they might exclude a man who had not been found to be a trustee. There are two questions put. The first question is, "Can it exclude or limit a person unless it finds such person to have been a trustee?" They ask, Can they omit from an order any person unless they find such person to have been a trustee, and, while a trustee, to have acted to the prejudice of the interests of the other owners? Must they not mean this: "having been found a trustee, has, during his trusteeship"? The possible interpretation is that a man, because he has been found to be a trustee of one block, may be robbed of his interest in another block of which he is not a trustee. I cannot offer to help the Court in the interpretation of this question. I think it means that if he is found to be a trustee, and is guilty of a breach of duty as a trustee——

The Chief Justice: If found not to be a trustee in Block 14, but a trustee in some other block.

Mr. Bell: I should think the simplest interpretation would be, if he is found to be a trustee in Block 14, they might leave him out of his beneficial interest—they might leave him out if he were found to be guilty of something in the nature of a breach of trust. To read this section as giving the Court a right to take away the man's land because they find that in another of these blocks he has been guilty of a breach of trust is surely not intended. We submit that it is not intended that his interest can be confiscated as to Block 14 if he is found to be guilty of a breach of trust in Block 11. If found to be a trustee in Block 14, then his interest can be limited in any way the Court may think fit.

FRIDAY, 5TH NOVEMBER, 1897.

Mr. Bell: I ask leave of the Court to cite a case which is a very important one in the Supreme Court, and I also ask leave of the Court to mention a case which I found last night relating to the Judge Wilson point. It is the case of Chatterton and Kaye (3, Appeal Cases, 483), and I wish to refer to Lord O'Hagan's statement on page 496. Briefly, it is this: The case was tried before Lord Coleridge without a jury. On the terms of his finding, judgment might have been so entered. He made a finding, and judgment was entered; then a motion was made, not for a new trial, but to enter the verdict, and Lord Coleridge sat in the Court of Common Pleas Division and stated to the Court what the meaning of his finding was. Now, it was not questioned that, if he had not been a Judge sitting to determine what was the meaning of his finding, he could have done so. The argument was this: that he was sitting to enter judgment on his verdict, and he, as Judge, had no right to say anything to his colleagues on the matter. Lord O'Hagan says, "Suppose the case had been tried by the Judge of another Court under similar circumstances, and he had reported to the Common Pleas on a new trial motion the reasons of its finding, they must have been accepted in their integrity and at their true legal value, and your Lordships must have so accepted them. And how is the matter altered because Lord Coleridge is the Chief Justice of the Court and reports directly to it by word of mouth?" Then, this point was, as your Honour suggested to me, really determined by this Court in the case Winiata against Donnelly (14, New Zealand Law Reports, Court of Appeal), in the judgment of the Court of Appeal delivered by Mr. Justice Denniston, at page 227. This is the case which I propose to cite on the other point, and which I omitted from my argument only by accident, in consequence of finding myself in reply. Your Honours will recollect what took place in that case. There was an error about the position of Pokopoko. The Court intended to draw the line at a particular place, but Pokopoko lay to the north, whereas they supposed it to lie to the south, and Winiata was excluded. The two Judges who decided the question originally, and drew the line, had never been asked what they meant, and the Court below say this on that point, at page 227: "It is extremely difficult to arrive from outside evidence at any person's intention. The question of what the Court actually intended was one in case of dispute really to be determined by the Judges, but during the ten years during which this litigation has lasted we are not aware of steps having been taken at any of the numerous judicial investigations on the subject to obtain from either of these gentlemen a categorical answer to a question as to whether they did intend to exclude Pokopoko settlement as distinguished from Pokopoko forest or district." We submit, your Honours, that that is a judgment by this Court; that a question of the intention of Judges who made an order in the Native Land Court is to be determined by the Judges—that they ought to be asked the question; and we submit it means that, if the question is asked, that is to be determined by the Judges themselves. Now, did the Court of Appeal mean that if these gentlemen had been asked the question and had made an affidavit—the only way, I suppose, it could have been brought before this Court on *certiorari*—were to be cross-examined, and asked as to their antecedents, and treated as ordinary witnesses? We submit that if the Judges in this case had been asked the question it means that they could not have been cross-examined as ordinary witnesses. This puts the Native Land Court Judge in the same position as a superior Judge, and different to that of a Magistrate, as suggested by the Chief Justices; and the judgment in the case cited is really in our favour.

Mr. Justice Denniston: What the Court really said was that in this particular case the question at issue was what was in the minds of the Judges.

Mr. Bell: I think your Honour will find that, on consideration of the circumstances, as they must be considered to show a parallel between the case quoted and the present, how impossible it is to put this view forward as a reference to this particular case. The whole question was whether the Court had or had not adopted a particular course gathered from the minutes, plans, and Acts; and affidavit after affidavit was filed, and then the Court of Appeal say, "Why did you not ask the Judges? They are the persons who are really concerned in the matter." I submit it was not so intended here, and that in the Native Land Court still more the same principle should apply as between Judge and Judge as applies in this Court as between Judge and Judge.

Mr. Justice Denniston: I do not think it was laid down as an abstract principle.

Mr. Bell: The Court applied in that case the principle we are contending for.

The Chief Justice: Is there nothing in the Act of 1880 or 1882 saying what the Clerk's duties are?

Mr. Bell: There is some statement, and your Honour refers to it, I think. There is one case in our Court as to the effect of these minutes—that of Mullooly *v.* Macdonald (7, N.Z. Law Reports, 1). As to the question of record, nothing is clearer than this: that the Court has control over its records. Your Honour dealt with the value of these minutes in your judgment in the Horowhenua case—Kemp against Hunia.

The Chief Justice: There are some cases which I have seen which lay down that if there is an officer whose business it is to make minutes those minutes are the best evidence, and have to be looked at.

Mr. Bell: We do not deny that they have to be looked at, and the minutes here are all in our favour. The entry of the 3rd December is entirely in our favour. If you have to go *aliunde* to explain, and the Judge's recollection is clear, then you cannot call evidence to contradict the evidence of the Judge.

Mr. Justice Denniston: You cannot get secondary evidence if the best evidence is available; you cannot get secondary evidence until you have exhausted the best.

The Chief Justice: Have you seen this case of Dews and Ryley? It was an action for false imprisonment against the Clerk of the Court. He had drawn up the committal in accordance with the minute which was made. It was contended that the committal was wrong because he did not commit at once. The Clerk drew up the warrant according to his own minute, and that was wrong, and the committal could not be made in those terms. In the action for false imprisonment the Judge was called, and said, "I did not make that order; I said it was to be committed forthwith." The Court said the Clerk's minute was the best evidence, and it could not look at anything else, although the Judge said he had said something else. Nobody suggested that the Judge's evidence was inadmissible for any other reason. Then, it appears that there is an earlier case—that of Urwin, in which Lord Bramwell says the Clerk's book is the best evidence.

Mr. Bell: We have not suggested that if there is a clear record the Judge's evidence would contravene the record; but, supposing you have to go *aliunde* to ascertain the meaning of an expression in the judgment, then we say the Judge only has to explain it. If the Judge does an act, and that act is questioned, I submit that he and no one else can say what the intention of that act is. My friend Mr. Baldwin cited the case Tully and Ngatatua, and Waata and Grice (2, Court of Appeal Cases, 177). The difficulty there was that the Crown grant was void. A certificate was revived, and the question was whether ejectment could be brought, and it was held that it could. Before I cite that case I do not wish to depart at all from the construction which I have suggested is the true construction of the words "intended trust" in the Equitable Owners Act; but I do not know whether this Court treats this matter as argued *inter partes* or from the Native Land Court. In looking up this matter last night I found that the effect of the interpretation which my friends seek is far wider than any one has hitherto anticipated. My friends, although the Act of 1886 was repealed by the Act of 1894, have themselves pointed out the fact that the Act has been revived and re-enacted in the Act of 1894, and I have subsection (10) of section 14. But besides that, this Court, under the Equitable Owners Act, has been turned loose upon the Poverty Bay district in "The Native Trusts and Claims Definition Act, 1893."

Sir R. Stout: Surely this is not open in reply?

Mr. Bell: No, but this is what I ask leave to refer to: What I am asking the Court to consider is that, if this judgment is a judgment *inter partes*, I can make a concession. If not, any concession I make cannot be taken into consideration. The contention is this: Supposing there are one hundred owners to a block held under the 17th section, and the Court makes an inquiry, ninety of these people out of the hundred cannot be affected by any irregularity in the investigation by the Court; but ten of them, because they happen to be registered owners, in consequence of the Court, on partition, having failed to do what the Act required them to do, remained trustees because of the original cloth which they wore. That is the argument. Supposing the Court should find that these ten people got too much, then the matter can be rectified; but, supposing the Court found that the ten got too little, then it cannot be rectified, and these ten only are the persons who could be disturbed by any reason which left them clothed with a trust in respect of their several individual allotments. They are still habited with the original trust by the certificate of 1867. So that I submit to the Court that the consequences are far wider than the present case. I turn to the case of Winiata *v.* Donnelly (14, N.Z. Law Reports, 209). This question arose on section 13 of the Act of 1889, and it is a section strictly analogous to the present, and not a section enabling the Judge to remedy errors as a Court under the Equitable Owners Act is entitled to discover trusts. This section 13 provides,—

"It shall be lawful for any person entitled to or claiming an interest in any land, who shall allege that his interest therein has been prejudicially affected by any error or omission committed or made in any decision or order of the Court, to apply at any time after the title of such land has been or shall hereafter become ascertained to the Chief Judge to inquire into the matters alleged in such application"—this is the Pokopoko dispute. "Such application shall be made in writing, and state specifically the grounds upon which it is made, and shall be verified by the statutory declaration of the person applying. Upon the receipt of any such application the Chief Judge may either—(1) By order under his hand dismiss the application; (2) hold an inquiry in open Court with the assistance of an Assessor; or (3) refer any question to a Judge sitting in open Court with an Assessor for his investigation and report. Public notice of the intention to hold an inquiry shall be given in the *Gazette* and *Kahiti;* and such further and other notice may be given as the Chief Justice may deem expedient. If it appear to the Chief Judge that the alleged error or omission has been committed or made, and that the interest in such land

of the person applying has been thereby prejudicially affected, the Chief Judge may make such order in the matter for the purpose of remedying such error or omission as the nature of the case may require: Provided that no such order shall affect or be deemed to affect the validity of any registration under a Land Transfer Act, or of any conveyance, transfer, mortgage, lease, contract, lien, or transaction made, given, or entered into of or in respect of such land, after the title to such land shall be ascertained, and before public notice is given of the intention to hold an inquiry. An order so made shall be final and conclusive."

Then, upon that case of Pokopoko, comes the determination of the case of Winiata against Davy, first by his Honour Mr. Justice Richmond, and secondly by the Court of Appeal as to what is error within the meaning of the section. What happened there was this: The Chief Judge, exercising his jurisdiction under this section, found as a fact that, first of all, Winiata was prejudicially affected in title by an error made by the Court. He found that the Court thought that Pokopoko was south, and excluded Pokopoko for the purpose of leaving Winiata in the Awarua Block, outside the Mangaohane. But it was proved, and he did not dispute it, that the Court which drew the line knew where it was drawing the line—that is to say, the boundary-points were known to the Court, although the position of the Pokopoko Settlement was not known. I submit that is strictly analogous, as showing how far you may rove. One would expect that in such a case, far more than in the present case, the roving commission would extend to rectify such a blunder; but the Court of Appeal and Mr. Justice Richmond held differently. They held that the order was in excess of the jurisdiction, and that the Chief Judge must be prohibited. The Chief Judge, acting under this jurisdiction, found the error, and then remedied it by putting Winiata and his friends into the block. But on both grounds, not only because he proceeded too far, but also because this was not an error of the quality which was defined by section 13, the Court of Appeal issued the prohibition. We submit that case is strictly analogous. The contrary construction which was contended for here is exactly the construction contended for in that case on section 13—a roving commission to inquire as to the intention of the Court, but as to the legal effect of the Court having acted incorrectly or improperly.

Sir R. Stout: First, as to the case of Chatterton: that is really against my friend. Lord Coleridge was trying the case without a jury, and, instead of saying it was a verdict for plaintiff or defendant, and giving his reasons orally, he chose to give them in writing. The Court said he was not bound to give them in writing; and could it be said that because he had given his decision in writing that that would exclude his right to make it orally? There is the case of Allerly (3, Appeal Cases, 489). It is a case of copyright; and the Lord Chief Justice ordered a verdict to be entered for defendant, and gave a written note saying that the defendant had copied to some extent two parts of the appellant's drama, but that it was unsubstantial, aud therefore he entered a verdict for the defendant, who wanted to upset the verdict in consequence. I submit that that authority does not deal with their case. On page 196 of "Best on Evidence" it says that if a Judge is called as a witness he must be treated like any other witness, whether he is sworn or not. In the case of Winiata and Donnelly the point was, had the Judges made a mistake; and before the jurisdiction of the Chief Judge could come in under section 13 of the Native Land Court Acts Amendment Act of 1889 it had to be shown that a mistake had been made; and all that the Court of Appeal said was this: "Is it not very strange, that if you rely on the Judges making a mistake, you should not have asked them if they had made a mistake? The question was whether there was a mistake or no mistake, and you have not asked them." The point, therefore, is that that case also does not help my friend at all. It only amounts to this: that if a mistake is alleged to have been made by any Judge the Judge should be asked about it; and therefore the case of Winiata and Donnelly has no bearing on this point. As to the argument about section 13, and the reference to the Poverty Bay grant, that does not help my friend at all; on the contrary, it helps me. The terrible effect he referred to is limited to three years, and this Act is not in existence now. It shows that my interpretation of *cestuis que trustent* is right. The very use of the words *cestuis que trustent* implies that my interpretation is right—that these people have been put in a grant as absolute owners, and this is to give the right to the *cestuis que trustent* to have the matter investigated.

Mr. Justice Denniston: I do not think the three years make the slightest difference in your argument, except that it remains *inter partes* for three years; beyond that, it does not affect Mr. Bell's argument.

Sir R. Stout: The point my friend was arguing was this: that this Act was in force now. There is nothing in the point as to the meaning of this section 13, and the decision in the case of Winiata and Donnelly. The whole question turned on an error of omission, and, if we have to go into the question of cases analogous, I would refer your Honours to the case of Arapata and Karina (12, New Zealand Reports, 696). The Chief Judge there did something he was not authorised to do. He adjudicated on something which was not properly before him, and therefore it was held to be an error of omission, and is referred to by Mr. Justice Richmond on page 217 of this case of Winiata and Donnelly. The decision of the Court of Appeal in dealing with that case was this: The point was, where was the boundary-line drawn; and the Court said there was no error as the boundary-line was drawn, although they may have made a mistake in drawing the line. It was true they would not have drawn the line where they did if they had had other facts to guide them. But the Court of Appeal said, "How can that be an error? A Judge or jury may come to an erroneous conclusion, but that is not an error." That error of omission could not apply, because the boundaries were in the exact position the Judges intended to draw them. We are contesting this question of trust or intended trust, because we say the Judge did what Mr. Justice Richmond says was extra-judicial. We say he had no power to make an order for Kemp on a voluntary arrangement when the voluntary arrangement did not exist. Your Honour asked a question, whether there is no provision in the Act for the decision of the Court being limited. There is, I submit. Section 12 of "The Native Land Court Act, 1880," contains this provision: "Registers of titles shall be kept by the Court, in which shall be recorded the result of every case brought before the Court."

Mr. Bell: I must ask the Court's consideration of the issues as a whole first, down to No. 13 of the questions, and ask your Honours to turn to the last passage of paragraph 13. I submit that these questions are to be dealt with in a concrete and not in an abstract form. One finding has been given, and it is that finding I want to refer to for one moment. The last passage of paragraph 13 says, "The Court, however, makes no definite finding on the point as to whether No. 14 was, at the Court of 1896, awarded to Meiha Keepa beneficially, as it is not necessary for this case to determine it." And then, in question 13, they ask, "Is the whole or any part of the Subdivision 14 of the Horowhenua Block subject to a trust in consequence of the several circumstances detailed above, or any of them?" Now, the meaning is obvious. If it be a question of intention, we have not yet decided that; but what it asks the Court is, Does not a trust arise by operation of law? Are we not relieved from determining the question what Judge Wilson intended by this: that a series of acts and omissions made Kemp a trustee by operation of law for the purpose of the Horowhenua Block Act?

The Chief Justice: I do not quite follow you. Do you say that this is capable of explanation? The paragraph says the Court makes no definite finding.

Mr. Bell: That means the special case presented to the Court. What I say is that question 13 explains it. They mean, we shall be relieved of it altogether.

The Chief Justice: They ask this question as a preliminary to decide.

Mr. Bell: No. Question 13 is: "Is the whole or any part of Subdivision 14 of the Horowhenua Block subject to a trust in consequence of the several circumstances detailed above, or any of them?" They ask this question, and say, "If he is a trustee by operation of law, by reason of certain circumstances, then we need not go into that." They ask whether he is or is not a trustee by the operation of law, exclusive altogether of what Judge Wilson intended. Therefore, they ask the Court to consider the several circumstances in answering the question detailed. I am not going into the questions again, but am asking the Court not to give an abstract answer, such as to question 3, for example, but to give answers *secundum subjectam materiam*. The Court will not forget that the Appellate Court is bound to act on its decision. It is required by section 92 of the Act of 1894 to act according to the opinion of this Court. The facts are: First, on the 25th November No. 14 had been allotted in trust, not for the registered owners, but for the descendants of Te Whatanui, who were not among the registered owners. The second fact is that on the 1st December a new allotment was made of equal area (No. 9) for the descendants of Te Whatanui, the descendants of Te Whatanui having refused to accept No. 14. The third fact is that on the 3rd December, "After providing for an allotment for all the persons in the title, there remained the portion of the said block, comprising 1,200 acres" (Block 14). That is in the beginning of paragraph 13. The fourth fact is that the Judge stated that he had hesitated to make the order in favour of Kemp for Block 14, as he considered it advisable, owing to Meiha Keepa having already had in the subdivision a section comprising 800 acres allotted him for the payment of his tribal debts at Wanganui, to adjourn the application, in order that the persons concerned in the apportionment of the Horowhenua Block should have an opportunity of considering whether Meiha Keepa's request in respect of Section 14, comprising 1,200 acres, being allotted to himself should be complied with. That is the fourth fact, and the Court will see the relevance of that fourth fact in a moment. What Judge Wilson states to the Court is reported in the 13th paragraph. The fifth fact is that an order was made on the 3rd December—and, with regard to this fifth fact, nobody can suggest, or has suggested, that it was intended as a trust for the registered owners.

Sir R. Stout: I do not admit that.

Mr. Bell: It is not suggested on the case that there was any intention. He made an order on the 3rd December, and I submit that nobody suggests, or can suggest, that that order was intended to be in favour of the registered owners. The emphasis is, of course, on the intention, whatever the effect may be, and for this reason Block 11 had been put in the names of Kemp and Warena Hunia. My sequence of facts is that a block on the 25th November is awarded to Whatanui's people, but upon trust; but these people got on the 1st December a block which was in the approved locality, and then Block 14 remains to be dealt with, as the Native Land Court and Appellate Court state, and was dealt with in some way; and I add that whatever the effect of what was done may be, nobody can allege that there was an intention to make it in favour of the registered owners.

Mr. Justice Denniston: But for this change, would there be a 1,200-acre block to deal with?

Mr. Bell: It is constructed as the proceedings go on.

Mr. Justice Conolly: What do you suggest was the position of Block 14 immediately before the order of the 3rd December was made? Was it part of the whole original block of which Kemp was trustee for the registered owners?

Mr. Bell: Yes, I suppose that was the position, just as the other blocks dealt with on the 2nd and 3rd December were; and your Honours will remember that is why I make the observation that upon that day they took the registered owners as a body and put them under the cover of Kemp and Hunia. The Native Land Court and the Appellate Court then say that, having made that allotment, the 1,200 acres still remain to be dealt with. Now, it is of the greatest importance, we submit, that the Court should bear these facts in mind when it comes to consider what is the meaning of the expression which the Court uses here, "voluntary arrangement." It is stated, we submit, as a fact by the Appellate Court that Judge Wilson did not say that on the 3rd December he acted on a voluntary arrangement. Your Honours have noted my fact—the fact that the Appellate Court report to you what the Judge said with regard to what he did on the 3rd December. Now, whether rightly or wrongly, he did not say to them that he had acted on a voluntary arrangement. He did not say it to them, because they tell you the contrary.

Sir R. Stout: Pardon me.

Mr. Bell: At page 138 it says,—

"The Judge stated that he had hesitated to make the order, as he considered it advisable, owing to Meiha Keepa having already had in the subdivision a section comprising 800 acres allotted

him for the payment of his tribal debts at Wanganui, and adjourned the application in order that the persons concerned in the apportionment of the Horowhenua Block should have an opportunity of considering whether Meiha Keepa's request in respect of Section 14, comprising 1,200 acres, being allotted to himself should be complied with."

Then I point out that what they go on to say does not refer to the question.

The Chief Justice: Do I understand you to say that it does not appear from the case that Judge Wilson was professing to act under a voluntary arrangement when he gave the 1,200 acres?

Mr. Bell: That is what I do say. The question is not whether Judge Wilson did proceed on a voluntary arrangement, but whether he said he did.

The Chief Justice: But surely you are bound by what this Court has said on section 3 of the case?

Mr. Bell: I am not going to avoid any difficulty. I am putting this case in order that I may approach the question, when I ask the Court first to arrive at a clear understanding of what the questions mean, so far as I can put them to the Court. There was the Judge proceeding upon a voluntary arrangement, and proceeding manifestly upon a voluntary arrangement. So he said, and so the Appellate Court reports to this Court. But it further reports to this Court that Judge Wilson said that in respect of Block 14 he took certain specific precautions. The question is as to what Judge Wilson said. He says, "I proceeded administratively upon a voluntary arrangement, but with regard to Block 14 I took certain precautions, which are here stated." The Judge therefore proceeded with regard to Block 14 upon a second voluntary arrangement. Nobody can pretend that he proceeded or purported to proceed in respect of Block 14 upon the arrangements of the first day, for the arrangements of the first day had given No. 14 to the descendants of Te Whatanui. Therefore the Judge did act upon what he conceived to be a second voluntary arrangement with regard to No. 14, and he states, with regard to that second voluntary arrangement, that he took certain specific precautions, which appear on the minutes. Now, it is of the utmost importance that, when the Court reads this question, it should consider these facts.

The Chief Justice: The paragraph states that the Judge adjourned the application in order that the persons concerned in the apportionment of the Horowhenua Block should have an opportunity of considering whether Meiha Keepa's request in respect of Section 14, comprising 1,200 acres, being allotted to himself should be complied with.

Mr. Bell: Yes, your Honour. That means that he adjourned it in order that the persons concerned in the apportionment of the Horowhenua Block should have an opportunity of considering it, and then he acted after that opportunity had been given.

The Chief Justice: Surely I misunderstand you when you say that was part of the original voluntary arrangement?

Mr. Bell: I mean the original voluntary arrangement gave No. 14 to the Ngatiraukawa, and then something remained to be done. However, it gives you the fact of what Judge Wilson said they did with regard to Block 14. What I am pointing out is that it is not suggested that it was in the original voluntary arrangement to give No. 14 to Kemp. That is obviously so. Nor did Judge Wilson say so. But what he did say was that on the 2nd December Kemp applied for it himself, and he awarded it to Kemp for himself. If he had acted in pursuance of the original voluntary arrangement it would be entirely different. Your Honours will see that this is a statement of fact, and what those express words "voluntary arrangement" mean when applied to No. 14 is important. It must mean a second arrangement made, of the existence of which Judge Wilson was satisfied, rightly or wrongly.

The Chief Justice: So far as I can see, that is borne out by the minutes.

Mr. Bell: Now I come to this question approached from that point of view. The Judge says, "I acted administratively when I was satisfied that the voluntary arrangement existed." Who is to determine whether or not there was a voluntary arrangement? Not this Court, not the Appellate Court, but the Judge. I submit there are authorities to show that. There are two ways in which the Court can proceed upon a partition. It may proceed upon what the Natives submit to it as a reasonable method of partition, or, if it does not so proceed, it must take evidence as to each particular block, and upon oath determine the answer. What, then, is it which entitles the Court to proceed on in the first way? Its procedure is empirical; but who is to determine whether there is a voluntary arrangement or not? The Judge of the Court. Now, as to the case of Hapuku *v.* Smith (12, N.Z. Law Reports, page 155), there is a distinction between that case and the present one. The Judge said, although the Natives strenuously denied it, that he had actually satisfied himself of the propriety of what was suggested to be a voluntary arrangement; but the question of the absence of people from the Court is dealt with in that judgment, and it is pointed out—and this I emphasize; this is my point—that the Native Land Court can proceed on any evidence it chooses to think sufficient. It could proceed by telegraphing to Parihaka. That is emphasized by the Judge in Hapuku *v.* Smith. In "The Native Land Court Act, 1880," section 23, there is a power relating to partition: "After such facts have been established to the satisfaction of the Court, it shall proceed to ascertain, by such evidence as it shall think fit (whether admissible in a Court of ordinary jurisdiction or not), the title of the applicant and of other Natives to the land, whether appearing in Court or not." And that section is carried into partition by the Native Land Division Act of 1882, section 3: "In carrying this Act into execution the Court may proceed in manner prescribed by 'The Native Land Court Act, 1880,' with reference to Native land, and may exercise all the powers therein contained. This Act shall be read subject to the interpretations contained in the said Act." Now, there is no doubt, therefore, that this Court, on partition, had power to satisfy itself as to the existence of an agreement by all the Natives, whether they were in Court or not; we submit, and for all anybody knows—or, at all events, if it was within his jurisdiction that he ascertained that—everybody was agreed. The absence of some of the people does not affect his right to determine that question. Everybody who was there had come to determine it, and if he determined it, who can now question the validity of

his determination? and if he determined it, he was entitled to proceed in the Court on the first method of procedure administratively, and not make a specific inquiry into the block. In Hapuku *v.* Smith there was a great deal of evidence of what was done in the way of a voluntary arrangement. There was nothing signed and nothing filed, and, though it contains the element that two of the chiefs were called, out of the number interested, and said the suggested arrangement was fair, I submit it goes the full length, because the Judge was the person to be satisfied whether or not the voluntary arrangement existed. He might have satisfied himself by telegraphing to Parihaka, or in every other way, but he was the person to be satisfied. The Court said he was satisfied. Now comes what he did with regard to Block 14. Whatever may have happened with regard to the other sections, there came a point on the 3rd December when there remained an allotment which it was his duty to determine. He could not leave the thing in that condition—something had to be done with it. Every Native had notice to be there, and in the course of the proceedings the question comes as to who is to be entitled to this Block 14, and Kemp applies for it. They rely upon the minute of the 3rd December.

The Chief Justice: That is quite apart from what occurred on the 2nd?

Mr. Bell: Yes; that had to be dealt with.

Mr. Baldwin: It is not admitted that Kemp himself personally made the application. That is in dispute. The application was made by somebody on his behalf.

Mr. Bell: However, the Court on the 3rd December proceeded to deal with the matter within its jurisdiction, and in respect of which every person had notice, and the Court came then to the conclusion that it was acting in pursuance of a voluntary arrangement in awarding this section to Kemp. Who is going to dispute the position of Judge Wilson on that point? It is suggested that because persons were absent from the Court therefore the Court could be prevented from dealing with this question. Again I say the Judge may have satisfied himself about who ought to be the successors, or who were lunatics, infants, or anything of the kind. Would the Court, in Hapuku *v.* Smith, have said there was no power to allot this land because there were some of these people who were lunatics and infants and were absent? I submit this Court cannot say the Judge was wrong in finding so, even though there may have been people not present in the Court. If the fact was one for himself, and he found it and acted upon it—that this second voluntary arrangement existed—every person dead and alive received notice to be there. Every person was bound to be there. Then the Court asks, "Is everybody agreed?"—assume that that was done—"Is everybody agreed? I ascertain the question, whether you are agreed, first of all." He says he hesitated, in order that the persons concerned in the apportionment of the Horowhenua Block should have an opportunity of considering whether Kemp's request in respect of Section 14 should be complied with. He explains that he did it for the purpose of asking the tribe, and then he does something with it. We submit the question whether the voluntary arrangement has or has not been sufficiently assented to is a question for the Judge of the Court to act upon, and if he is satisfied, then the voluntary arrangement is found to exist. And I submit that the precise words of Mr. Justice Richmond in the case cited apply. With regard to the second part of the question, the words "Was it not imperative that the requirements of that section should have been fully complied with?" means, Was it not imperative that the Court should have recorded it in its minutes? That is answered in Hapuku *v.* Smith. It is the second part of question 1. The emphasis is on "every one" in the sentence, and I submit that is answered by Hapuku *v.* Smith. You can have a voluntary arrangement if the Judge is satisfied that a voluntary arrangement had been arrived at. It is for him to say. Then, the second part of the question is, "Was it not imperative that the requirements of that section should have been complied with prior to giving effect to any such arrangement?" and we contend that means, Was it not imperative that the Court should first record the existence of a voluntary arrangement in its minutes? which they did not do. That, it is submitted, is answered precisely in Hapuku *v.* Smith. It does not say it was: it says, "it may." With regard to the second question, this is a very specious question. The words "no such consent," in the second line, mean "no such consent of the whole." The words "merely administratively," in the fourth line, are misleading and incorrect as applied to Block 14. The Court itself invites the answer that this account which Judge Wilson gives of what took place with regard to Block, means that he acted merely administratively. It all requires qualification and careful consideration before the answer is given. What I am asking the Court to do is to give its answer *secundum subjectam materiam.* With regard to the third part of this question, that is the exact converse of the question that ought to be put, and the Court will see that the answer is so given as to show that what is really required by the Judges is the converse. The answer we suggest with regard to the last part of the question, beginning with the words "considering the position he held formerly as trustee for the whole of the estate under the title of 1873," is this: "His original position as certificated owner is immaterial. The only point for decision is whether there was intention by the Court of 1886 to constitute him a trustee." Now I come to questions 3 and 4, and ask the Court to take them together. It is suggested here, using the words of his Honour the Chief Justice in Warena Hunia against Kemp, that these allotments on partition are equivalent to conveyances. The Court, looking at them from that point of view, say, if this was done, and the Judge only acted administratively, he could have issued no order for Block 14 apparently, inasmuch as they found that the whole of the Native owners were not there; and, secondly, because Kemp is himself the person to convey to himself. But we submit again it was for the Judge to say that there was a sufficient voluntary arrangement, and that if he found it he might proceed administratively upon that. On question 4*a* they suggest this: that the Court, having dealt with this block on the 25th of November, was *functus officio.* That, we submit, is conclusively dealt with, for the Court can amend its judgment. The Ngatiraukawa objected to the allotment the Court made for them, and every one agrees that they shall have it somewhere else, and later on the Court makes an order giving another piece of

the block to the Ngatiraukawa; and it is said that you cannot do that, and that the original decision is cast-iron. (See *In re* the Murimotu Block, and Mr. Justice Richmond's decision in Maloney *v.* McDonnell, 7, N.Z. Law Reports, page 1.) The whole thing is so treated in the best way the parties can do it, and nothing is finally done until the orders are sealed. Nothing is conclusive except the sealed order. Supposing they could not make a fresh allotment, what are they to do? The absurd result is this: Suppose the Court were to answer "No" to that question, that it was cast-iron and fixed, then Kemp would be a trustee for Ngatiraukawa. They put it that the result was that the Court was *functus officio* on the 25th November, and made another order, and by that result Ngatiraukawa get altogether 2,400 acres, not according to the intention of the Court, but according to some abstruse principle of law. They point out "If not, were not both parcels appropriated to the same purpose, and did not Kemp, in whose favour they were ordered, become clothed with a fiduciary capacity in respect of both for the purpose referred to,"—namely, the purpose of the 25th November and the purpose of the 1st December. That is their meaning of *functus officio*. With regard to questions 5 and 6, I submit they should be taken together, and that the simple answer "No" will answer them. I do not know that my friends seriously contest those questions.

Mr. Baldwin: I understand Sir Robert Stout does not intend to argue it, and I do not.

Mr. Bell: Passing to section 7, which is a question argued by Mr. Baldwin yesterday, I think questions 7, 8, and 9 may be taken together. I should like, if the Court sees no objection, to put my answers to these questions and number them, and then I can get the answers on your Honours' minds without taking up your time unduly. First, as to its not being essential on partition. The point here is that the sections of the Native Land Court Act of 1880 which are referred to here are sections relating not to division but to original investigation, and the Land Division Act of 1882, in section 3, empowers but does not require the Court to proceed in the manner prescribed by the Native Land Court Act of 1880. The case of the Mangaohane Block (9, N.Z. Law Reports), referred to by Sir Robert Stout and myself, was a case of original investigation, and marks the reason why the rule should be absolute in the investigation of title and not necessarily absolute upon partition. And the reason why is this: The outside boundaries of a block are matters affecting not only the persons called before the Court, but also the persons outside owning the adjoining lands; and in the case of the Mangaohane Block, Winiata, a person not a party to the investigation of Mangaohane, and others not found to be interested, were affected by the alteration of boundary which took in a piece of land which was intended to be a portion of the Awarua Block, and which was taken in by a proceeding which was not in any way *inter partes*. The Court should not proceed under the Act of 1880 if satisfied that the parties are satisfied with the altered boundaries. The second point is that in this case, and by the Horowhenua Block Act, the inquiry is limited to the piece of land forming Division 14 as on the boundary altered, and also the Block 11 as defined in the plan on the order. I have already pointed out to the Court the fact that the lands which are to be the subject of inquiry are defined in the Horowhenua Block Act, and are in the schedule. They are the existing division. It is not a trust of land. Taking Block 11, for instance: it is suggested that the Court should read this piece of land into Block 11, and make a trust of it; and, conversely, it is suggested that you are to read part of Block 6 into Block 14. That is the effect of the argument. The question, it is submitted, is not what might have been the case had Block 14 been elsewhere. On this point I wish to suggest this contention to the Court: Supposing the grievances were that Block 14 had been left as shown on the sketch-plan, but had only 800 acres. The Court did two things—it awarded 1,200 acres. If Ngatiraukawa had not got 1,200 acres there would have been a clear breach of the agreement. It awarded 1,200 acres, and it is a question of acreage, and also a question of position. Supposing the acreage had not been made up by the position being shifted, as was done here, would not that have been an equal ground, and even a more serious ground, of complaint on behalf of the persons concerned if Ngatiraukawa had only got 800 acres instead of the 1,200 allotted to them? Somehow or other, as between the award of acreage and the award of position, the boundaries must be arrived at. Supposing the Court finds Kemp to be trustee of the registered owners of this block, how is it going to replace the acreage of which the *cestuis que trustent* are short? Assume that portion of it is to go into Block 11, and Kemp is declared to be a trustee, they are entitled to the land west of the railway-line and 1,200 acres east of the railway-line. Where are they going to get the 1,200 acres? If it be a trust, where is the acreage to be made up? To this single issue the other side will answer, "We shall be content if the Court gives us back Block 11." But that is not an answer. I am assuming that Kemp is a trustee. Where is the land to come from? Out of No. 6? That would be equally a breach of trust, because No. 6 was given to the persons who had been left out of the original investigation. It is equally a trust block. Where, then, are you going to get the 1,200 acres? In the same way, when there has been an award of area, and a hesitating sketch award of boundary, you must arrive at some solution between them; and, if the Court had arrived at this solution, we submit it has crystallized it, and the statute has admitted the crystallization, and the Court has, on the assumption that Blocks 11 and 14 were duly defined as to area and lakes by the orders, the sole question being, Is there any trust affecting the land included in these orders, the land being located and defined? The next answer is that Kemp and Hunia, in writing, approved the alteration. They were the only persons known to the Native Land Court as having control of the block. In this Court, trustees by our rules represent their *cestuis que trustent*. Why not in the Native Land Court? It is no use talking about advertisements, of plans, and so on; if some of the people are dead—an advertisement will not reach them. The widest circulation does not reach a dead Maori. On the argument used that there is no validity in the consent of Kemp and Hunia signing the plans, the Court could not have issued its orders at all unless it had proceeded to advertise, and in some way reach the dead men under sections 27 to 32 referred to. That is to say, the Court, because they

are bound to put in 143 persons who had an interest in Block 11, was estopped from determining a question of boundary, however small or large the area, in the endeavour to settle the difficulty which arose between the area and location. If they had taken it out of Block 6, or out of Block 12, as I think Mr. Baldwin suggested, then, would the consent of these people have been sufficient? Take the case of the *Rerewaho*. They were an unknown body in No. 6—an absolutely unknown and unascertained body, whom no advertisement could have reached. Supposing an error in the boundaries in No. 6, could not in that case Kemp, on their behalf, have agreed to have the boundary of Lot No. 6 shifted? What does the Native Land Court, in respect of boundaries, by advertisement, provide in cases where there is no objection? The Court may proceed; but how could they in Block 6 if there was an unknown and unascertained body. Does it make any difference in this case that the persons concerned in Block 11 happened to be named on the certificate? Now, Block 6 was altered, and the same result applies to Block 6. As you will see on looking at the plans, the area and position of Block 6 was altered. What, then, is the result of that? Was the Court completely estopped because it allotted a portion of land to a trustee for an unascertained body? Does that put an end to its power to adjust a block of land for area and position? The next point is this: that in every case of partition there must first be a sketch-plan.

Mr. Justice Denniston: You have not referred to the point that the person interested was himself the trustee.

Mr. Bell: I think it would be convenient to refer to it here. The point is this: Kemp himself is the person who is trustee of No. 6. He is also, with Warena Hunia, trustee of No. 11. Somewhere or other between No. 6 and No. 11, 1,200 acres are to be located. He is a person who, as trustee of No. 6 and co-trustee of No. 11, sees no objection to the location of No. 14 in the new position. As a matter of fact, as is shown in the case, it did not diminish the area of No. 11, unless you take it as all the land west of the railway-line, by more than 200 acres. If Kemp had concealed this it might have affected the question; but the Judge, in exercising controlling discretion in this matter, tries to ascertain if there is any objection to this course. That is what he has to do if he proceeds under advertisement. He finds that there is no objection by the person who is a co-trustee of No. 11, and who may be assumed to consult with the *cestuis que trustent;* and the surveyors having put it there, being unable to get the acreage elsewhere, a trustee is not disqualified by his interest, though the quality of his consent is affected. I submit, then, further—still upon questions 7, 8, 9, and 10—that in every case of partition there must be first a sketch-plan, and, secondly, a plan to be approved by the Court. That, I think, must be conceded. If the parties exercise any function at all during partition, that must follow in every case. There must be a sketch-plan, and then the plan subsequently approved by the Court, and you must call in a surveyor between the sketch-plan and the final plan; and that is the point I wish to impress upon the Court—that the final plan must be made by the surveyor called in in the interval. The Act provides that on the orders when sealed there shall be a plan which is the proposal for partition, assuming that the parties by voluntary arrangement exercise any discretion in the matter at all. Now, what happens then? The surveyor is called in. The lines drawn by the Court are merely guiding lines; the area is really that which the Court decides. When it draws a straight line it means a thousand acres or so, and not the line. It would mean a line where the boundary was a stream, and there the decision would be location, and not area. The surveyor is called in, and has to provide lines roughly following the adjudication of the Court—to include the area which the Court has allotted. That is the point I wish to impress upon the Court. The person really called in to do the administrative work is the surveyor, and then in ordinary cases it always necessarily results in some displacing of the lines. The sketch-lines themselves, if for 1,000 acres, could not include 1,000 acres—that is a mathematical impossibility; and then the Court attaches that final plan to its order, or a copy of it. If that be so, the same process is contemplated or determined upon by the Court by which it shall take care that its order expresses as nearly as possible the result of its adjudication; and if the Court is satisfied of that, and if it takes due precaution, then it is submitted that is all that is necessary. This is the next point—again speaking of the Horowhenua Block Act as a crystallization of these two divisions: Can you spell out of that Act an intention to say that if one of these divisions thus defined trenches upon another of these divisions as originally intended, or *vice versâ*, that the land there trenching is to be subject to the trust which affected the other? Nothing can be clearer than the final intention of the Judge who signed these orders: the Act requires him to sign the orders, and therefore, it is submitted, gives him a final discretion in the matter. It directs that not only shall the orders be sealed, but also signed by the presiding Judge. Now, does the Horowhenua Block Act mean—can you spell out this elaborately-drawn-out intention—that if one block so crystallized is found by the Appellate Court to have trespassed upon another area which was intended for another trust altogether, then Block 14 should be impressed with the trusts of Block 11? Supposing it had been shifted the other way to provide the area, then would Block 14 have been impressed with the trusts of Block 6? Is it to be ascertained what trust existed with regard to the area thus defined, and defined by the Native Land Court in its order—ascertained whether that land trespassed on to land which was included in another and entirely separate and entirely distinct trust? Supposing, for instance, as I have already put it, this Court had come to the conclusion that this Block 14 is Ngatiraukawa land—on the *functus officio* question that this Block 14 belongs to Ngatiraukawa, and that the trust is for Ngatiraukawa: let us follow that position out. This Ngatiraukawa trust, it is suggested, though intended to be 1,200 acres, has trespassed on to the other trust—the registered-owner trust. Who is, then, to have it? Are Ngatiraukawa to lose 600 acres, and has the land of Ngatiraukawa thus to pass to other *cestuis que trustent?* The intention of the Act, it is submitted, is not to shift from one set of *cestuis que trustent* an area of land which was included in a block awarded to another *cestuis que trustent*, but to ascertain what set of *cestuis que trustent* was intended to be ascertained for the 1,200 acres which are bounded on the one side by the property. That involves this point——

The Chief Justice: You do not say there is any lot which would be affected except the block mentioned in the Act?

Mr. Bell: My friend Mr. Baldwin said another lot ought to have been affected.

The Chief Justice: I understand if any of the 1,200 acres was to be made up it must be made up somewhere else.

Mr. Bell: Supposing the Court finds that Block 11 trenches on to the piece of land awarded to Ngatiraukawa out of the middle of Block 11, supposing they found that Ngatiraukawa's 1,200 acres was not made up, and that No. 11 has got a piece of Ngatiraukawa somewhere: is it intended to transfer that? Is it area or location? It is submitted that it is area, as defined by the order. I wish to add that I ask the Court, on this question, to say where is the intended trust within the meaning of the Equitable Owners Act on this set of questions. How does this constitute an intended trust out of the existing and defined Block 14? Just adding one word with regard to question 10, which I have taken collectively with the others: Supposing an advertisement had been issued under the Act of 1880, sections 27 to 32, but had not been sufficient, then that would have been a block again which would have constituted an intended trust within the meaning of the Equitable Owners Act. And supposing the map had not remained the required time in the place where it was deposited, that, again, would have operated to create an intended trust of this defined area. You cannot take the omissions. The things must be done fully or not at all; and, if a technical omission which renders the act of the Court inefficient entitles the Court to declare a trust by reason of a defect in the Courts carrying out the duties imposed by the statute, that might be properly remedied in another way. But is it a trust? Then, with regard to question 11: that is entirely what I have been arguing, and I do not wish to add anything to it. Now, as to question 12, we ask that the collective answer to that shall be "No." It is a collection of circumstances asking the Court whether the absence of these men does not nullify the orders *ab initio*, and leave the certificate of title issued under the 17th section in full force—at all events, with regard to those particular sections. Does the mere fact that these matters have happened, if discovered by the Appellate Court, create a trust? Whatever its answer may be on *certiorari*, we submit they do not, if discovered by the Appellate Court in this procedure, nullify the orders *ab initio*, and leave the land under the 17th section. Let us examine the questions for a moment. They are all questions going to the 52,000 acres. Every one of these blocks is open to investigation under the Equitable Owners Act, proceeding under section 14 of the Act of 1894. I do not say there may not be questions affecting the Court on partition. The Court is asked to say whether the Appellate Court, proceeding under the Equitable Owners Act, must, in its jurisdiction, regard these orders as void *ab initio* because a Supreme Court might on *certiorari* have so found. With regard to that, there is a question of the lapse of time, there is a question of acquired interests, and there is the question of how the boundaries may have been acted upon by parties intervening. It does not follow, because the Court has acted without jurisdiction on a certain particular, that therefore it necessarily voids the proceedings. You cannot take an abstract question of this kind and say, without regard to the circumstances and the special jurisdiction in which the Court is sitting, and the special matters relegated by the Legislature, that therefore that Court is entitled to treat the orders as void. And so, we submit, they are not void for the purpose of the inquiry relegated to the Appellate Court. Nor is it bound, or indeed entitled, to treat them as such. With regard to question 13, I have dealt with that practically in opening my argument upon these questions. It sums up the position which the Appellate Court intends to take. If the Supreme Court advises the Appellate Court that by reason of the matters herein alleged Kemp is in law a trustee, then that will obviate the necessity of the Native Land Court determining the question, which they say is not relevant to to this case—namely, whether Kemp was in fact a trustee. The fact they leave on one side altogether, and they ask the Court whether, under the circumstances stated, Kemp is not a trustee, without any inquiry into the question whether the section was allotted to him alone or not. Supposing, for instance, it had been proved that a voluntary arrangement had been signed—this is the question the Court puts—by every one of the registered owners, and supposing the Court refused to act upon that, did it judicially inquire and determine that Kemp was entitled to Block 14 as beneficial owner? Still, the Appellate Court says, inasmuch as the muniment of title is not cancelled, is not Kemp therefore a trustee under section 17? Still, on these two first assumptions, even assuming that a voluntary arrangement was come to, and assuming that the Judge had proceeded with due deliberation and form of law, with the assent of everybody, and determined Kemp to be duly entitled, is the fact that the plan was not deposited in accordance with the provisions of the Act of 1880 sufficient to constitute Kemp a trustee under the Equitable Owners Act by reason of an assumption of law that he was a trustee under the 17th section, and therefore clothed with what they call a fiduciary capacity? It is these words which mislead the Court. They seem to think the fiduciary capacity of a person who is one of the registered owners is the same fiduciary capacity as is contemplated by the Equitable Owners Act. It is very questionable, unless it has been decided by authority—and I do not think it has been so decided—it is very questionable whether these people who are registered owners are anything else than recipients of rent, and in that sense trustees. What do they hold? They are persons entitled to lease, and, if they receive the rents, are liable to render accounts; but they are not trustees any more than if the Registrar of this Court was directed to execute a lease, and, if this Court was receiving the rents, the Registrar would be a trustee in no other sense whatever. He never would have been constituted by the Court by any intention trustee except that as defined by the 17th section. You find there was a flaw in the constitution of his Crown grant, and you relegate him not to the fiduciary capacity or trusteeship you have alleged against him, but you pass to another capacity—a limited and confined fiduciary capacity—and you say, "Very well, now we will pass by all questions of how this man became absolutely entitled," because you find another set of conditions behind by a mere chance,

and you could not set up that fiduciary capacity against any of the certificated owners. It is submitted, therefore, that the answer to question 13 is necessarily one that is qualified, and answered and met by the answers to the previous question, and that it is all qualified by the answer which the Court should give in its judgment—namely, that these matters are extraneous to the jurisdiction under which it is sitting.

Sir R. Stout: I simply submit that my friend has been traversing the point he argued before —that the Horowhenua people are confined within the four corners of the Equitable Owners Act. The facts submitted by the Appellate Court, summarised, are: First, that the original title was under the 17th section of the Act of 1867; second, that the grant was issued to Kemp on behalf of himself and the other 142 registered owners; third, that the Court sat to partition the land under the Land Division Act of 1882; fourth, that the Judge proceeded to partition; fifth, that the partition was not made by the Judge judicially. I submit that the Appellate Court have come to that conclusion, and have a right to come to that conclusion.

Mr. Bell: It is for us to come to a conclusion.

Sir R. Stout: I submit not. The Court cannot leave its facts to this Court to determine. It is expressly stated in the Act that it can only put questions of law to this Court.

Mr. Justice Denniston: The question of what is judicial and what is administrative may be largely a question of law.

Sir R. Stout: The case is stated in section 92 of "The Native Land Court Act, 1894": "The Appellate Court may state a case for the opinion of the Supreme Court on any point of law that may arise, and the decision of the Supreme Court on such point of law shall be binding on the Appellate Court." Therefore this Court has no power to deal with statements of fact at all. The sixth fact is that the Judge sat on the 25th November, and in acting administratively, in pursuance of a voluntary arrangement, did award this block to Kemp, and not for himself. That is, what he awarded on the 25th November; that is clear. The next fact which is clear is that Kemp on the 2nd or 3rd December—we say the 3rd, because that agrees with the minute-book—applied for the land himself, and the Judge on the 3rd challenged objectors. None appeared, and he made the order for Kemp; but that order appears to be a confirmation of a previous order made on the 25th November.

The Chief Justice: Do you admit that the case states that Kemp did apply for himself?

Sir R. Stout: It does not say that he himself applied, but simply an application was made that the grant should be issued in his name. That is admitted, and those are the facts found. "The Court, however," it says, "makes no definite finding on the point as to whether No. 14 was at the Court of 1886 awarded to Meiha Keepa beneficially, as it is not necessary for this case to determine it." It is rather peculiar that the Assessor's evidence was not taken as to what he understood. He is just as much a party of the Court as the Judge, and I apprehend that Judge Wilson cannot speak for the Assessor, and contend that the award is incomplete if the Assessor does not agree. Then the Court says, in paragraph 13,—

"The Court is of opinion that Judge Wilson is under a misapprehension as to the order in which the subdivisions were made, as it is sufficiently manifest from the minutes of the Court of the 25th November, coupled with other circumstances, that Subdivision 3, afterwards numbered 14, was the parcel of land before the Court on the 25th November, and not No. 9, which only came before the Court for the first time on the afternoon of the 1st December. As regards that part of Judge Wilson's explanation concerning the application made by Meiha Keepa on the 2nd December, to have No. 14 allotted to him for himself, there is no entry in the minute-book in support of the circumstance; but this is not conclusive proof that no such application was made."

The application in the minute-book was on the 3rd, and that application shows that this application for Block 14 was made on the 3rd. In the minute on Subdivision 14 the application is set out, and states that objectors were challenged, but none appeared. My friend seems to think there was some suggestion of a new voluntary arrangement as to Section 14, but there is no such thing stated in the case, and I assume that the Court will not accept it as a matter of fact. I submit that the confirmation applies this theory which was set up in the Appellate Court—namely, that the two blocks were to be held, which would they accept. Some of the Whatanuis wanted this new Block 9 and some wanted Block 14, and the fact that there was a delay of two years before they took up Block 9 shows that there was some doubt as to whether they would accept it or not.

Mr. Justice Denniston: Supposing that the trust had been intended to be given to Kemp, then there seems to me to be nothing in the confirmation, because you have to go outside the record to get the evidence of another trust. The record as it stands is a property in Kemp.

Sir R. Stout: But there is this very important point: that the Judge seemed to imagine that what was done on the 25th November was void. Your Honour will see that in the minutes of the 25th November the 1,200 acres are to go to the Whatanuis. I submit that shows that a confirmation to Kemp must be a confirmation in pursuance of what had been done in the Court before, and it was not intended in the Court before that this was to go to Kemp himself. The Court will surely take the minutes, because I have already quoted section 12 of the Act of 1880, which shows that the Court is to have the register of title. I next come to this point about what is clear from the evidence—namely, this fact, that there was no voluntary arrangement in the sense in which the Act speaks of a voluntary arrangement. I do not understand very well what my friend's contion is, about this Native Land Act and section 3 of the Native Land Division Act. At one time he says that the whole Act is not incorporated in the Native Land Division Act. Could there be a voluntary arrangement at all, then?

Mr. Bell: I did not say so.

Sir R. Stout: He says he reads this into the Act: "In carrying this Act into execution the Court may proceed in manner prescribed by 'The Native Land Court Act, 1880,' with reference to Native land, and may exercise all the powers therein contained." Does that imply that the Court can proceed to carry out a voluntary arrangement?

Mr. Bell: I said these words of section 73 introduced the section of the Act of 1880 which permits the Court to ascertain the voluntary arrangement.

Sir R. Stout: My friend has forgotten what he said dealing with voluntary arrangements as to surveys.

Mr. Bell: I said they may.

Sir R. Stout: I understood you to say the surveys were not included.

Mr. Bell: I said, with regard to survey, that the word "may" was permissive, and that, although they had before to deposit the plan, they would not by section 73 be required, as in the other Act.

Sir R. Stout: I am prepared to take it either way. I assume that the Court could proceed under section 56 as under section 58 as to evidence. Then, the Court has to consider what is a voluntary arrangement within the meaning of section 76. Can there be a voluntary arrangement among the Natives themselves? Can there be a voluntary arrangement if they do not all agree? Now, there is no such question here as my friend tries to raise—namely, that the Judge found that there was a voluntary arrangement, or found that all the Natives agreed. He proceeded on the assumption that a voluntary arrangement could be come to without all the Natives agreeing. If he decided, for example, that there is evidence before him that all the Natives are in accord who are the owners, I do not say we might not be bound by that; but if it is proved by the Appellate Court, as the Court has found, that the Natives were not there, and there is no finding in the Court by Judge Wilson that the Natives were there, then, I submit, there could be no voluntary arrangement, because it must be a voluntary arrangement amongst all those interested.

Mr. Justice Denniston: He found there was a voluntary arrangement.

Sir R. Stout: No, he did not, your Honour.

Mr. Justice Denniston: Can you say the Appellate Court is entitled to say that when he found there was a voluntary arrangement he meant something else, and that the law meant that all the parties were joined?

Sir R. Stout: I say there must be an expressed finding, and there was none; and the Court of Appeal's decision in Winiata and Donnelly states that the mere finding of a Judge, which is not correct through a mistake or an omission, does not bind the Court. In that case they found there was no jurisdiction, and prohibited the Judge from proceeding. My assumption is that Judge Wilson had no more power than Judge Davy had in that case to find a voluntary arrangement if none existed. I am clearing the ground for two points, dealing first with this point—namely, that it appears clear on the face of the proceedings that there was no voluntary arrangement within the meaning of the Act, whether Judge Wilson found it or not.

Mr. Justice Conolly: Where is this fact—that there is no voluntary arrangement?

Sir R. Stout: It is called an alleged voluntary arrangement. It is in paragraph 3, and it says, "A large number of the registered owners of the said block were also dead or absent at the time the said voluntary arrangement was made." Secondly, I submit there could be no voluntary arrangement within the meaning of the Act. I say it is perfectly plain that they had none from other evidence, and not from the Judge, because the registered owners were absent.

Mr. Bell: I say, rightly or wrongly, he assumed or found that there was a voluntary arrangement under section 56, and was acting under it. He may have been quite wrong in law and in fact; but, as a matter of fact, he found there was a voluntary arrangement.

Sir R. Stout: As far as the minute-books are concerned, the point would be whether there could be a voluntary arrangement when the Court did not enter the decision in its minutes. Section 56 of the Act of 1880 says, "It shall be lawful for the Court, in carrying into effect this Act, to record in its proceedings any arrangements voluntarily come to amongst the Natives themselves, and to give effect to such arrangements in the determination of any case between the same parties." I submit that would be a condition precedent to him acting under any voluntary arrangement—namely, that it had to be recorded in the minutes. I am also submitting this: that the Court of Appeal in Winiata and Donnelly held that, although there was an omission found by Judge Davy, they issued a prohibition against him, and that his decision was not binding on the Court, and could be quashed. I rely on that point in Winiata against Donnelly as a conclusive authority to show that the mere decision of a Judge of the Native Land Court does not bind this Court in a question of jurisdiction. I come now to the survey point. I understood my friend to argue that these sections 27 to 32 inclusive were not binding on the Native Land Court, and he cited section 3 of the Native Land Division Act to show that the provisions of the Native Land Court Act could not be applied by the Native Land Court, and that consequently they now complied with sections 27 to 32. Let us assume that. Then, may I ask, what power had they to alter any plan except the plan approved by Judge Wilson and the Assessor? This point has been answered in the case *In re* Te Waha-o-te-Marangai Block (15, Law Reports, p. 171), issued in March of this year.

Mr. Bell: Is that a subdivision case?

Sir R. Stout: That was a subdivision case, and the question was whether the plans could be altered after the Court had come to a decision. That is the point; and they relied upon this section of the Act of 1889—namely, section 11:—

"If it shall appear to a surveyor, when making a survey in pursuance of any order of the Court, that a deviation from the line laid down by the Court would for any reason be expedient, he shall give immediate notice thereof to the Registrar, and upon receipt of such notice a Judge may make such inquiries in the matter as he may think fit, and amend the order if he shall consider it advisable so to do."

Well, it was contended that that could not mean doing what was done in this case; but, as Mr. Justice Edwards says, "I am satisfied that this narrow construction . . . ought not to be placed upon the enactment in question." My point is this: that my friend cannot rely upon sections 27 to 32 to amend the plan other than before the Court. Would he point out to me under what section the plan could be amended? If the Court has chosen

to say the block ends with the railway-line, what power had the Judge of the Court, without the Assessor, to change the block? The Court will notice that the Court has to do all these things. The Court consists of a Judge and an Assessor; it does not consist of a Judge alone. Section 5 of "The Native Land Court Act, 1880," says, "The Court shall consist of one Chief Judge and such other Judges, together with such Assessors, as the Governor may from time to time determine." Here the award in this case was made by a Judge and a particular Assessor. Now, I want to know what power there was without the Assessor to change the block. In the case I have referred to counsel relied on the 11th section of the Act of 1889, but the Judge said that in addition they could import these sections 27 to 32. But they could not rely upon these sections to alter the plan. Mr. Justice Williams said that if sections 27 to 32 were not complied with, then there was a want of jurisdiction; and Mr. Justice Conolly agreed with that decision. That is in the Mangaohane Block case, at pages 753 and 758 (9, N.Z. Law Reports). I think those pages show that if these sections 27 to 32 are not complied with, then there is no jurisdiction. Now, I want to know how Judge Wilson has power to alter the plans of a Court. There is no power given under the Native Land Division Act to alter plans or evade a decision once pronounced by a Court. My friend says the surveyor comes in between the sketch and the final plan; but where is the right for the surveyor to come in? I say, strictly speaking, except that there is a statutory power, or the Court meets again, no small details can be altered. The Court has before it what this plan says [plan referred to]. I presume the surveyor would, perhaps, have to plot them on the ground.

Mr. Justice Denniston: That could be done afterwards.

Sir R. Stout: The Act of 1880 presumes them to be plotted on the ground. The surveyor goes to the ground, and he finds that when he comes to plot the land on the ground the maps are inaccurate. He plots on the ground something which was not plotted in the Court. There was a preliminary plan, prepared, no doubt, by a surveyor. The point is this: The Court, when it made its order, proceeded on a plan—there is no doubt about that; and it marked its order on a plan. That is what it did on the 3rd December; and the Judge sent this plan to a surveyor to plot on the ground. That being so, the order on the face of the plan was that this block was to the west of the railway-line. The surveyor then goes and changes the order of the Court. Judge Wilson complained very bitterly of the surveyor upsetting his subdivision in favour of Kemp. My point is this: that there is no statutory power for a Court to accept the altered plans of a surveyor unless the statutory provision in sections 27 to 32 of the Act of 1880; and Mr. Justice Edwards, in his judgment on this point, said,—

"The Railway Company appeared by their counsel to show cause against the rule. Upon the argument it was contended that the authority given by section 11 of the Amendment Act of 1889 was simply an authority to authorise a deviation from the lines originally laid down upon the sketch-map, and that this authority could not extend to so radical an alteration of the boundaries as, even with the consent of all parties interested, to place portion of a subdivision in an entirely different part of the block from that shown upon the sketch-map. I am satisfied that this narrow construction, which is obviously opposed to the true interests of the Native race, ought not to be placed upon the enactment in question; but even if the section ought to be so construed, I think that the plaintiff fails in establishing that he is entitled to have the rule made absolute. The proceedings upon the partition were, as has already been pointed out, under 'The Native Land Court Act, 1880,' and I think that what was done may be supported as an exercise of the jurisdiction of the Court under sections 27 to 32 of that Act. It is, I think, plain that all that has been done by the Native Land Court is fully warranted by these provisions; and, though it may be true that some of the formalities prescribed were not strictly followed, it appears to me that it was competent to the parties interested to waive these formalities. If so, it is unquestionable that they have been waived."

What does that show? I say, if my friend cannot invoke sections 27 to 32, where is the statutory provision to alter the award of the Court of the 3rd December? There is no statutory provision unless these sections can be invoked, and if they can be invoked, then the decision of the Supreme Court by Mr. Justice Williams and Mr. Justice Conolly is that unless the sections are strictly complied with the Court acted without jurisdiction. Now, we find that the original Court, with the Assessor, did not concur in this, and we find that Kemp was assenting to something as trustee on his own behalf.

Mr. Justice Denniston: That would be a breach of trust.

Sir R. Stout: There was not only a breach of trust, but my friend invoked the Supreme Court rules with regard to a trustee and a *cestuis que trustent*. When there is a conflict between the *cestuis que trustent* and trustee, the trustee cannot represent the *cestuis que trustent*. If the Court finds there is a conflict between his right and the *cestuis que trustent* the order is not binding if the *cestuis que trustent* brings the matter before the Court. Therefore my friend's illustration is of no value, because this was a conflict between the trustees and the *cestuis que trustent* as to Block 11: so that that argument will not help him. Unless my friend can invoke the statutory authority of the Act of 1880 to vary the plans there was no power to make Section 14 go west of the railway-line; and, if there was no power, can it be said that these orders, made without jurisdiction, are an estoppel on the Native Appellate Court? (Rule 65, page 26, of the English cases). That is the point. How can these orders, if made without jurisdiction, be an estoppel on the Native Appellate Court to prevent them inquiring into the nature of this land? This is a statutory right of amendment, and the Court of Appeal has decided that if the statute has not been complied with, then the Court has proceeded without jurisdiction. How can these orders, made by Judge Wilson in August, 1887, be binding on people who were the original owners of the land if the orders were made without jurisdiction? How can they bind the Appellate Court, and prevent the Court from getting at the truth of the set of facts, trust or no trust? My friend sets up these orders of Judge Wilson and says, "They block your way to find out whether there was a trust or no trust." He says you cannot say these orders are invalid, even if contrary to the statute, yet these orders are an estoppel; and, although the Supreme Court

might set them aside by *certiorari*, yet they block the Appellate Court. Now, I submit, the Court has all the powers of the Supreme Court, and if they found the orders to be invalid there is nothing to prevent them finding that they are invalid. Therefore, in dealing with this question the Court should support the Appellate Court, and say that, if these orders are invalid, the Appellate Court has the right to say so, and they must answer the question of law on the assumption that they must answer on the question of facts.

The Chief Justice: There is an amending Act of 1881, which allows the certificate to be under the signature of the Judge, without the Assessor.

Mr. Bell: That is the Native Land Division Act of 1882.

Sir R. Stout: The Native Land Division Act says that the Judge alone can sign orders of partition; but that is not the point. That is merely a mode of certifying to what has happened in the Court. That is in subsection (2).

The Chief Justice: That negatives your idea that you want an Assessor.

Sir R. Stout: No, I submit it does not. Your Honour will see also that section 10 assumes that all the owners shall be in Court. That is an application for the jurisdiction of the Court, just the same as in a partition amongst Europeans. One person may apply for a partition, but would the Supreme Court deal with the partition in the absence of those interested in the land? Now I come to the questions. I submit that the question of law the Court asks to be dealt with must be answered. The first question is, "Does not section 56 of 'The Native Land Court Act, 1880,' require the assent to a voluntary arrangement under that section of every one of the owners, registered or otherwise, to render it effective, and was it not imperative that the requirements of that section should have been fully complied with prior to giving effect to any such arrangement?" I submit the answer to that must be "Yes." It is assumed that there are to be trustees appointed under section 10 of the Native Land Division Act. The second question is most confusing, because it has mixed up five or six things in one question; but I submit that its meaning is this: If the consent of all is necessary, can a voluntary arrangement made by a few bind those not parties to it? I submit not, and that the answer should be that the proceeding of the Judge could not vest the land in Kemp.

Mr. Justice Conolly: There might be a thousand persons interested in this land, and a considerable number might be old and bedridden, yet you say they must all be present.

Sir R. Stout: Yes, to a voluntary arrangement. They must consent by writing or by their agents.

Mr. Justice Conolly: There is nothing about writing. I read it literally.

Sir R. Stout: I read it literally also, and I say all must be represented.

Mr. Justice Conolly: Supposing the arrangement had been reduced to writing, and one of the persons died in the interval, I understand by your argument that would be fatal.

Sir. R. Stout: Possibly an agreement come to amongst the owners might bind them if he agreed before death. I do not think there are many voluntary arrangements.

Mr. Justice Conolly: I do not see how, if it is read literally, it is possible to get one.

Sir R. Stout: I have been in Native Courts where partitions were asked for, and found that voluntary arrangements were simply impossible, and if made were done by bribing some of the bigger chiefs. Passing to question 3, I submit that is really citing, in effect, the decision of the Chief Justice in the case of Warena Hunia and Kemp.

Mr. Bell: That is a catch question.

Sir R. Stout: I do not know why my friend should call it a "catch question." There is the question, and the Court is asked to answer it. Question 4 is the same point really involved in the second question. As to question 4*a*, I submit that if there was a valid order on the 25th November of a specific piece of land that neither Court had power to upset that decision, and the result is that the order made on the 3rd December is invalid. The suggestion was to give 2,400 acres to the descendants of Te Whatanui. The minute shows that this Block 3 was set aside to carry out a prior agreement made between Kemp and Donald McLean in 1874. Now, if Kemp got this land and Section 9 to fulfil that agreement, and if one was sufficient to fulfil the agreement, then he must hold that other land for the owners.

The Chief Justice: If it was the intention of the Court—of Kemp and all the parties—to vest this land absolutely in Kemp, still the result would be that it was held by him as trustee.

Sir R. Stout: I do not admit that.

The Chief Justice: Supposing Judge Wilson intended to give Kemp a third, and it had been agreed to by all the parties. Assume that; still the accident of this omission would render the Court *functus officio*, and the result would be that this man would hold it subject to the *cestuis que trustent*.

Sir R. Stout: The Appellate Court might hold that, although there was a *cestuis que trustent* in the block, Kemp might be made a sole *cestui que trust*. There is a resulting trust for himself and others. The Court has to deal with Block 11 and Block 14, and might decide that Kemp is entitled to Blocks 14 and 11. What we want is to get the Court to say the Appellate Court shall have power to try these things on their merits. We are not raising the technical point; it is the other side who are raising these technical points. My friend raises the technical point that the orders block the Court from doing justice between the parties.

Mr. Bell: I must say that that is a misstatement.

Sir R. Stout: I say he is raising these orders as an estoppel on us to prevent us and the Appellate Court getting at the merits of the question; and when he says we are raising technical points, I say we are raising them as a reply to his estoppel, in order that the Appellate Court may deal with this matter free from methods of procedure and technical points of any kind. As to question 6, I do not think it matters when the cancellation was done. It seems to me that the Court could have proceeded or not, and does not affect the jurisdiction. On question 7 the answer must be in accordance with the decision of the Court of Appeal, as stated by Mr. Justice Williams and

Mr. Justice Conolly in the case I have already referred to, and that would mean that if a survey was not made in compliance with sections 27 to 32 there would be no jurisdiction, and if not invoked, there is no statutory power to have this plan amended at all. That answers 7, 8, 9, and 10, and, practically, 11 too, because all deal with the question of the plan; and I submit the answer should be that there is no statutory power to amend the plans except the statutory power conferred by sections 27 to 32, and, if invoked, they must be strictly complied with; and I submit that the Court never consented to this order, and that the parties interested had no notice, and gave no consent. As to question 12, I submit that that is so. I submit that, these orders being invalid, the only thing is to issue a certificate under the 17th section, and the Native Appellate Court can then proceed under the Horowhenua Block Act to find out who are the true owners. As to question 13, I submit that if the orders are set aside, then it is clear there has been no partition, and, if there has been no partition, the registered owners are entitled to have a partition made now, as if these orders had not been made. And I submit also that even though the orders stood, still, on the investigation of title which the Equitable Owners Act gives them the right to, they would have the right to go into all the circumstances, and not merely to inquire as to whether Judge Wilson intended a certain thing or not. The only other thing I wish to mention is the one point as to the case my friend relies on as to the meaning of question 13. Winiata and Donnelly's case, I submit, is a strong authority for us, because it shows that the decision of even the Chief Judge in the Native Land Court that he had jurisdiction does not make an order valid. He made an order, and the Supreme Court said, "He has wrongly interpreted the statute, and we shall set that order aside"; and if the Supreme Court can say that in that case, it has a right to say that these orders are invalid, and cannot be binding on the Appellate Court.

Mr. Stafford: I have nothing to add, your Honours, to what my friend, Sir Robert Stout, has said.

Mr. Baldwin: One point arises on my friend Mr. Bell's opening on the facts. As to the fifth fact, he states that the order was made on the 25th November to Kemp, and that nobody has suggested it was an intended trust for the registered owners. It was either intended, he says, for Kemp or for Kemp as a trustee for the Ngatiraukawa. But I submit that it was impliedly intended by the registered owners that whichever of these two alternative blocks the descendants of Te Whatanui did not accept should be held in trust for the registered owners.

Mr. Justice Denniston: You say they were simply put in his hand as a stakeholder.

Mr. Baldwin: Yes; and that was the intention in the minds of the tribe.

Mr. Bell: I cannot permit that to go in.

Mr. Justice Conolly: You must admit that there is nothing to show the intention of the original owners.

Mr. Baldwin: I took down the note of what my friend said very carefully, and he said that nobody had suggested that it was intended as a trust for the registered owners. Now, we do contend that it was intended as a trust for the registered owners. The second point I want to dwell upon is my friend's rendering or construction of the decision in Hapuku *v.* Smith. The decision was perfectly clear that if the Judge and the Assessor acted judicially, and affirmed that they acted judicially, this Court will not deny that they acted with jurisdiction in making a certain partition, although it is alleged by other persons that they made the partition by a valid voluntary arrangement. If made with discretion, they had the right, even if the absence of writing made the voluntary arrangement inoperative. I do not propose to go seriatim through the questions. With regard to the first question, I submit that where all the owners are ascertained a voluntary arrangement amongst the Natives themselves must mean amongst all those Natives, and, when it is said that the case could be decided if this voluntary arrangement was between the same parties, the "same parties" must refer to the persons who are actually parties to the voluntary arrangement. By Mr. Bell's contention, if there were five owners in a block, and two appeared and suggested to the Court that nineteen-twentieths of the block should be given to them, that is to bind the three absentees. As to the necessity for recording this voluntary arrangement, your Honours will see that it is only such arrangements within the terms of the statute that had to be given effect to—that is to say, arrangements in pursuance of the previous part of the section. The first part of the section states that the Court is to record such arrangement, and the second part is that the Court can give effect to such arrangement when recorded. With regard to the second question, I submit that the answer to that, from my point of view, can be expressed in this way: that where a Court, imagining or being led to believe that it is acting in pursuance of a voluntary arrangement which never exists, makes certain orders imagining that it is carrying out that voluntary arrangement, that those orders should not bind—that they are not operative. I would cite the authority Blythe *v.* Preece (9, New Zealand Law Reports). As to question 3, I submit that the authorities are clear. "It shall be lawful." There must be discretion. (Regina *v.* Adamson, 1, Q.B. Division, page 206; 4, Best and Smith, 959). If the Court exercises no judicial discretion the orders are a nullity—that is to say that if this was a voluntary arrangement the Court should record and give effect to it. There is also the case of the Bishop of London, in 24, Q.B. Division. I submit it has been found as a fact, and also as a conclusion of law, by the Appellate Court, whose findings are final and conclusive, that the Judge did act administratively. What they say in paragraph 3 is this: "The Judge being of opinion that he had no power to depart from the terms of the alleged voluntary arrangement in any respect whatsoever."

The Chief Justice: Is it not that it means, when he says he acted administratively, that he did not consider it any part of his business?

Mr. Baldwin: Apparently that is what he meant—that he had nothing at all to do with it when the parties said they agreed to this. I submit he mistook his functions. On the seventh question the instances quoted by Mr. Bell seem to me the very strongest argument against the

position he was taking up. As I understand him, because there may be cases in a partition where it may be impossible to obtain the assent of all the parties, therefore the section should not be complied with. Now, I submit that it is just because these sections are designed to operate as judicial proceedings by the Court so as to estop the whole world that the Act made them compulsory. Take this case of Mr. Bell's—that it was land that had never been adjudicated upon at all. Surely there is no one who can bind the parties interested, because there is no one entitled. And that was the very reason why this section was enacted. "If," he says, "Kemp and Hunia could not bind these people, it would be impossible to carry out the previous intention, because they were the only people who could represent them"; and I say it was just for that very reason that parties could not be found always, that the sections were enacted, so that a Court proceeding should interpose and estop any subsequent complaint. And, turning to the case of Te Waha-o-te-Marangai, it is decided that the formalities spoken of there may be regarded as the carrying-out of the section of 1880. Mr. Justice Edwards said that was material, the carrying-out of these requirements; but the giving of certain specified notice might be waived if all the parties were present and agreed to the plan.

Mr. Bell: I only propose to address two observations to your Honours. First, with regard to the case, 15, N.Z. Law Reports, page 171, cited by Sir Robert Stout, and referred to by Mr. Baldwin. It is a case very much in point. It is in the March number. The point is this: Mr. Justice Edwards's dealing with the case similar to that of Warena Hunia and Kemp. He decides, rightly or wrongly, that the requirements of sections 26 to 32 can be waived. With regard to the other observation I wish to make, Sir Robert Stout dealt with this word "confirmation" in the minute. He says—and I will not answer his argument, but it does seem to be of some importance—that the confirmation of that order was in his own name. What I am pointing out to the Court is that "confirmation" cannot mean "confirmation of a trust in favour of the descendants of Te Whatanui," whatever it means, and for the simple reason that on the 1st December the Court had declared a trust of other land. Sir Robert Stout says it must mean the re-establishment of that order. What we say is this: that the term "confirmation" is a matter there which requires interpretation, just as the term "in his own name" requires interpretation. Then, that brings in the question of what was meant by the man who said he was going to confirm the orders in his own name, and that can be known to one person and to one person only. The Assessor is not a Judge; he is there to assist the Court.

The Chief Justice: Could the Judge act against the Assessor?

Mr. Bell: Certainly he can, and the very point was put in one of these cases. In some matters the Assessor's concurrence is essential.

Mr. Justice Denniston: Who signs the order of the Court—the partition order?

Mr. Bell: The Judge.

Mr. Justice Denniston: Does the Assessor?

Mr. Bell: No; I do not think the Assessor's signature is required to anything now, although it is necessary he should sit on the bench. In some matters his concurrence is expressly required, and in other matters he sits there, and is simply an Assessor.

Sir R. Stout: We rely on the section of the Act of 1880.

The Chief Justice: We will take time to consider the judgment.

JUDGMENT OF HIS HONOUR THE CHIEF JUSTICE.

Before answering in detail the questions submitted by the Native Appellate Court, it is, I think, desirable that the opinion I have formed upon the governing question in the case should be stated.

The most important point is: What was the jurisdiction intended to be conferred on the Appellate Court by the 4th section of "The Horowhenua Block Act, 1896," with regard to certain portions of land therein specified, and particularly a portion of land therein spoken of as "Division 14"? It is not in contest that this portion of land and the other portions or divisions were once parts of a larger block, known as the Horowhenua Block, the title to which had in 1874 been so far ascertained that a certificate had been issued under the 17th section of the Act of 1867, with the name therein of Major Kemp alone, but as to which there were a large number of registered owners; that on a subdivision of this land in 1886 by the Native Land Court that Court had by several orders purported to subdivide the whole block into fourteen subdivisions, of which Division 14 was one; and that a Land Transfer title was in due course given for some or all of the subdivisions, but certainly for Division 14. Now, on the one hand it is contended that when the Legislature, by "The Horowhenua Block Act, 1896," declared null and void the Land Transfer certificate of Division 14, and enacted that "The Native Equitable Owners Act, 1886," should for the purposes of the Horowhenua Block Act be revived, and that to enable *cestui que trusts* to become certificated owners the Native Equitable Owners Act should apply amongst others to Division 14, it was intended by the Legislature that the Court should, as to this Division 14, first ascertain whether, on the subdivision of the block and the creation of Division 14 as one of the divisions, it was intended at the subdivision proceedings, either by the Court or by the registered owners, as evidenced by their proceedings in Court, that Division 14 should be taken by Major Kemp, subject to some, and, if so, what, trust, or, at any rate, not as sole beneficial owner.

On the other hand, it was contended that it did not appear from the Horowhenua Block Act that the jurisdiction by that Act given to the Native Appellate Court was so limited, but that it was intended by that Act that the Appellate Court should ascertain whether or not the so-called trust in favour of registered owners which had been created over the whole block by reason of the certificate under the 17th section of the Act of 1867, granted in 1874, with the name therein of Kemp alone, and the 145 registered owners, had, as to that part of the block described as Division 14, been

n due course of law terminated. It was herein contended that if in the proceedings on the subdivision the Native Land Court had not, with regard to Division 14, followed the directions of the Native Land Acts regulating the preliminaries to and the proceedings in the subdivision, then the so-called trust arising out of the certificate under section 17 remained, as to Division 14, unaffected by the subdivision. I am of opinion that the latter contention is not admissible, and that the first contention is the one which is supported by a purview of the Horowhenua Block Act. If it had been intended by the Legislature that the Native Appellate Court should ascertain whether or not the Native Land Court had in its subdivision proceeded in due course of law, the main and substantial provision would not have been as it is—that the Appellate Court should proceed under and exercise the jurisdiction conferred by the Native Equitable Owners Act. That Act was passed for the purpose of ascertaining whether, in any given case, a person, though appearing on the title to be absolute owner, had when obtaining that title been intended to hold, not for himself alone, but for others, or for himself and others: that is, admitting the validity of the title of the apparent owner, the Court was to inquire whether, though the person named in the title appeared to be absolute owner, he was nevertheless affected by an intended trust. It was not within the scope of that Act for the Native Land Court to ascertain whether, by reason of faulty proceedings in the Native Land Court, a title had been obtained which ought not to have been obtained, or which was intended should not have been obtained.

It was contended on behalf of the opponents of Major Kemp that section 15 of the Horowhenua Block Act is an independent section, conferring all the powers of "The Native Land Court Act, 1894," and "The Native Land Laws Amendment Act, 1895," and that whatever revising, correcting, or nullifying powers are conferred by these Acts are exercisable as to Division 14.

But the answer to this is that these powers are given for the purpose of carrying out the provisions of the Act. The purposes of the Act are, as I understand it, the ascertaining by the exercise of the jurisdiction given by the Native Equitable Owners Act whether there was any, and, if so, what, intended trust, and if a trust, then for whom, and the conferring of individual titles on any found to be entitled as beneficiaries. For these purposes the powers referred to in section 15 would be exercisable. The Native Equitable Owners Act contains but few provisions: it seems in that Act to have been taken for granted that the ordinary powers of the Native Land Court would be exercisable in the carrying-out of the Act. Section 15 of the Horowhenua Block Act is for the purpose of providing expressly as to the Native Appellate Court, in exercising jurisdiction under the Horowhenua Block Act, for what was assumed in the Native Equitable Owners Act to be the case with regard to the Native Land Court in exercising jurisdiction under the Equitable Owners Act.

Taking the view I do of the scope of the Horowhenua Block Act, the fact (if it be so) of the Native Land Court, in the subdivision proceedings, acting upon insufficient evidence of a voluntary arrangement not formally recorded, or omitting to formally cancel the certificate granted under section 17, or other such matters, are not subjects for inquiry under the Horowhenua Block Act with regard to Division 14. I think that the Appellate Court cannot go behind the Native Land Court subdivision orders. There is, of course, one matter upon which the orders are not conclusive. They are not conclusive on the question whether Major Kemp or others, though intended to appear sole beneficial owners, were intended not to be so in reality, but to hold subject to some trust.

The subdivision orders were in due form signed and sealed by the presiding Judge (Mr. Wilson) alone. This is in accordance with the law. The Assessor does not sign and seal such orders. It appears that the approval of the survey of the piece of land affected by the order relative to Division 14 was by the Judge alone, and without previous notice by advertisement. Even if there were any irregularity, or something more than irregularity, in this, the matter is not one for inquiry by the Appellate Court under the Horowhenua Block Act. Even if it had been, I should have been inclined to the opinion that in subdivision proceedings each order must be deemed provisional till the whole subdivision is completed by actual survey. It seems to be alleged as a grievance, going to the validity of the order for Division 14, that after the order for Division 11 was made for 15,000 odd acres (being the balance of the land on the west of the railway-line) the order for Division 14 was made for 1,200 acres on the eastern side of the railway-line, but that, as upon survey of the 1,200 acres it was found that 1,200 acres could not be given without trenching upon some other divisions already ordered, the Division 14 ought to have gone short—at any rate, should not have had the deficiency made up out of Division 11, on the west of the railway-line. As already stated, I incline to the view that any order on subdivision, though made prior to another, is so far provisional that it may have to be rectified as to location, and even as to area, when the orders come be completed by actual survey.

What seems to have taken place was that Warena Hunia, to whom, conjointly with Kemp, Division 11 was ordered, agreed that the deficiency in No. 14 should be made up from the 15,000 acres in Division 11, and that it is said by the opponents of Kemp that the agreement was ineffective, as Warena Hunia and Kemp, though the only names in the order for Division 11, were not solely interested in that division, inasmuch as they held it on behalf of themselves and a large number of others. It is unnecessary to determine whether such an agreement by trustees, if free from fraud, would be binding on the beneficiaries or not. There might be much to support it. If the Native Land Court could, upon the deficiency for Division 14 being ascertained, open up the subdivisions, it does not seem beyond the powers of the representative owners to come to some agreement in order to prevent delay and expense and trouble of opening up the subdivisions by the Court.

However, it is not necessary to determine this question. It is not, in my opinion, a subject for inquiry by the Appellate Court. I have now stated my own opinion upon the governing point in the case, and upon some of the more important questions.

The answers to the questions put by the Appellate Court are the answers of the Court.

JUDGMENT OF HIS HONOUR MR. JUSTICE DENNISTON.

I agree with the judgment of his Honour the Chief Justice. The case stated by the Native Appellate Court propounds for the consideration of this Court no less than eighteen questions, raising a very much larger number of minute issues. The manner in which the questions have been framed was the subject of comment during the argument. Many are obscurely worded, and almost all are framed argumentatively, and in a way to suggest predetermined conclusions by the Court. These peculiarities of form were, however, admittedly owing to the fact that they were mainly framed on the formal propositions submitted by counsel in the argument before the Court, and it is to mention this only that I refer to the matter.

What answer is to be given to the questions, and, as to a number of them, the question whether it is necessary to answer them at all, depend upon the result of a preliminary inquiry into the meaning and object of the Act under which the Appellate Court in this matter derives its jurisdiction ("The Horowhenua Act, 1896"), and what was intended to be the scope of the inquiry under it. It was contended in the first place that the Act contained a legislative assumption, and consequently a legislative enactment—that Section 14 of the Horowhenua Block was, in fact, trust property. In this I am quite unable to concur. There is nowhere any specific statement to that effect. The Act recites the fact that a Commission had sat to inquire into the Horowhenua Block, and that it was expedient to, as far as practicable, give effect to the recommendations of such Commission. But it does not profess to accept the findings of that Commission; and it neither states such findings or recommendations, nor incorporates them directly or by reference. The preamble is a mere statement of the reasons for passing the Act. Section 4, which was relied on to support the contention I am dealing with, begins "to enable *cestuis que trustent* to become certificated owners of certain portions of the said block," the provisions of the said Act, excepting section 18 of "The Native Land Court Acts Amendment Act, 1889," shall apply to certain divisions of the block, including Division 14. This, in my opinion, does not even in form assume that there must be *cestuis que trustent* as to all these divisions. It must, I think, be read, "to enable the *cestuis que trustent*, if any."

It might have been better to have used clearer language. The draftsman has evidently had recourse to section 2 of "The Native Trusts and Claims Definition and Registration Act, 1893," but has, I think, omitted to notice that the concluding words of the paragraph from which the form is taken alleges the fact that the lands the subject-matter of the section had been granted to persons who had been selected to be trustees for themselves and others, but who had been placed by such grants in the position of absolute owners of such land. This, of course, made the opening words clear and unambiguous.

There are no such words in the Horowhenua Act, and their absence is a significant indication of the intention of the Legislature. Nor, do I think, can any such inference be drawn from the language of section 10. The Public Trustee, or some party other than the grantee and the person whose dealings are impugned, must of course be intrusted with the initiative as to any proceedings to attack such dealings. The Supreme Court has ample powers to deal with any breach of trust or any fraud which would entitle any person prejudiced thereby to legal redress. The limitation of time to six months may reasonably be attributed to the conviction that proceedings should not be unduly protracted, and to the belief that proceedings in all the Courts might reasonably be expected to be concluded within six months. It would require, of course, the plainest and most explicit words to compel a Court to conclude that the Legislature had not only cancelled the Land Transfer certificate which barred the way to inquiry, but had predetermined, without any judicial investigation, one of the principal questions in controversy between the parties. An Act which takes away from an individual a status which he has acquired in due course of law, and which retrospectively subjects his property to special disabilities, and to investigation under special conditions and by a new tribunal, is not to be loosely construed. Legal rights, if destroyed, must be destroyed by express words, and not by a strained and doubtful inference.

We have next to ask whether the intention in the Act was confined to re-enacting, for the purposes stated in the 4th section of the "Native Equitable Owners Act, 1886," and amendments. That is the only directly empowering section, unless sections 14 and 15 can, as contended, be held to confer further special powers. I do not think that these sections can be held to be more than giving to the Court the powers and jurisdiction of the Acts therein mentioned, so far as necessary, in the words of section 15, for the purpose of carrying out the provisions of the Act.

The section refers only to procedure. The empowering provisions of the Act must be sought in the other sections. The words "special powers" are, I think, satisfied by the provisions of section 4, which, besides re-enacting the Equitable Owners Act, provides specifically for specially dealing with the interests of any person found to be a trustee.

The empowering provisions of the Native Equitable Owners Act are contained in a few lines. If it had been intended to give any larger power, particularly if it had been intended to give the extensive power now contended for, I cannot understand why it was necessary to re-enact that Act at all. What, then, are the powers conferred by the Native Equitable Owners Act? Under it the Court had power, upon the application of any Native claiming to be beneficially interested, to make inquiry into the nature of the title to such land, and into the existence of any intended trust affecting the title thereto. According to the result of such inquiry, the Court may declare that no such trust exists, or, if it finds that any such trust does or was intended to exist, then it may declare who are the persons beneficially entitled.

Power is further given to make orders under which the persons found to be beneficial owners are to be deemed to be such owners as if their names had been inserted in the certificate or grant. What is meant by making inquiry into the nature of the title? Was it intended that under it the Native Land Court should have power, on the motion of any Native who chose to assert that he was beneficially interested in land held by another Native, on what was, on the face of it, a good

title granted in due form by a competent Court, to go behind such title and investigate and pronounce on the validity of that title, or upon the proceedings or jurisdiction of the Court which purported to grant it? If so, then one is surprised that during the currency of the Act it should have been thought at any time necessary to apply to this Court, as to lands within the Act, for *certiorari* or other proceedings to test the validity of any title or proceeding. The contentions made in the present case, and entertained by the Court—at least, so far as to submit them for the opinion of this Court—show how far the construction now contended for may be pushed. It is suggested that it is open to the Court to examine into the constitution of the Native Land Court which made the subdivision of 1886, to ascertain whether it complied with certain preliminary formalities as to cancellation of certificates, and generally to ascertain whether it had jurisdiction to make the order of subdivision. It is, I think, a much more reasonable construction of the statute to say that it was intended to be confined in the first instance to ascertaining the nature of the title to the property in which the applicant claimed to be beneficially interested—that is, to finding out who had, at the time of the investigation, been declared the owners of the land under the proceedings of a competent tribunal, and that it was not competent for the Court to challenge the procedure of such tribunal, and, in effect, set aside an existing title. Having ascertained this, it has then to determine whether, at the time such title was granted, the person or persons who, on its face, are absolute owners were really intended to hold the land in trust for other persons. This, I have always understood, is the construction which has been put upon the statute.

JUDGMENT OF HIS HONOUR MR. JUSTICE CONOLLY.

The judgment which I am about to read is that of Mr. Justice Denniston. I have not thought it necessary to prepare a separate judgment, since I concur in his judgment, and also in that of the Chief Justice; and we are all agreed upon the answers to be given to the questions submitted by the Native Appellate Court.

ANSWERS TO QUESTIONS SET OUT IN CASE STATED BY THE NATIVE APPELLATE COURT UNDER SECTION 92 OF "THE NATIVE LAND COURT ACT, 1894," FOR THE OPINION OF THE SUPREME COURT.

The Court answers the questions as follows:—

To the 1st: That it is not material to the present case whether the 56th section of the Act referred to does so require, or whether it was or was not imperative that the requirements referred to should have been complied with.

To the 2nd: We answer that the land may be deemed to have effectively vested in Kemp as beneficial owner, notwithstanding the matters mentioned in this question, if the Appellate Court is satisfied of the intent of the Native Land Court in making the order.

To the 3rd and 4th: It is answered that the questions are on immaterial matter.

To 4A: We answer that the competence of the Court on the occasion referred to is not a matter for inquiry.

The matters upon which the 5th and 6th questions are put were not argued.

To the 5th, 6th, 7th, 8th, 9th, and 10th: We answer that the matters upon which the questions are put are not subjects for inquiry.

To the 11th: The answer to this question is that the land is not subject to the trust on the ground mentioned.

To the 12th: We answer that, as the matters referred to in this question are not subjects for inquiry, no other answer is necessary.

To the 13th: The answer to this question is in the negative. The subject for inquiry is not whether the Native Land Court, in creating Division 14, conducted the proceedings with due attention to the law prescribing the preliminaries to or regulating the proceedings in the subdivision.

To the 14th: The answer to this is that, though Judge Wilson's evidence ought not to be disregarded, but, on the contrary, ought to be accepted as of great weight, it is not to be treated as conclusive, but weighed with other evidence.

To 14A: The answer to this is in the affirmative.

To the 15th: The answer to this is in the negative. With regard to the exception made in the question, we answer the question apparently involved in that exception: that the orders are to be taken as valid, but not as conclusive that the person named in the order was absolute or sole beneficial owner.

To the 16th: The answer to this question is that the subject for decision is not whether it was validly agreed, but whether the Native Land Court proceeded upon a determination that it had been so agreed.

To the 17th: The answer to this is in the negative.

To the 18th: The answer to the first part of this question is in the negative, and to the last part in the affirmative.

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