

14. Were the plaintiffs, or either of them, aware, before the month of May, 1874, that the said deeds of mortgage and conveyance, or either of them, purported to affect their title to the said 163 acres, and, if so, when first?—Yes; by Paora Totoro from execution of deed, and Rewi on or about 11th December, 1873.

15. Did the defendant, at the time of his making application for the certificate, know that he was not rightfully entitled to the said land?—No.

16. Were the plaintiffs, Hohaia and other Native persons, in possession adversely to the defendant before and at the date of the issue of the certificate, and were they, or any of them, rightfully entitled to such land?—Yes, in possession adversely, and not entitled, as the grantees had signed the deed of conveyance.

AFTER-PLEA.

The defendant, by way of after-plea, says,—

1. That on the 21st day of January, 1874, he made an application to the District Land Registrar for the District of Hawke's Bay, in the manner provided by "The Land Transfer Act, 1870," requiring the land in the declaration mentioned to be brought under the provisions of the said Act; and the said application was received by the District Land Registrar, and all notices and advertisements required by the said Act were duly given and published. The defendant is unable to set forth the application in the words and figures thereof, the same not being in his custody or power.

2. The plaintiffs, or some one on their behalf, on or about the 10th day of July, 1874, pursuant to the provisions of the said Act, caused caveats to be entered in the said register, forbidding the bringing of the said lands under the provisions of the said Act. The defendant is unable to set out the said caveats in the words and figures thereof, the same not being in his custody or power.

3. The plaintiffs allowed three months to expire from the receipt of the said caveats, and did not give written notice to the District Land Registrar of their having taken proceedings in a Court of law to establish their title to the said land, or obtain from the Supreme Court an order or injunction restraining the said District Land Registrar from bringing the said land under the provisions of the said Act.

4. The District Land Registrar, on the 15th day of November last, duly signed, sealed, and entered in the register book, and issued, a certificate of title comprising the said land under the provisions of the said Act in favour of the defendant, and which certificate is in the words and figures following:—New Zealand Certificate of Title Register Book, Vol. III., Folio 113. "Frederick Sutton, of Napier, in the Province of Hawke's Bay, storekeeper, is now seised of an estate in fee-simple, subject nevertheless to such incumbrances, liens, and interests as are notified by memorial underwritten or indorsed hereon, in that piece of land situated in the Province of Hawke's Bay aforesaid, containing by admeasurement one hundred and sixty-three (163) acres or thereabouts, being Section B of Oamaru Block 3N, in the District of Napier aforesaid, bounded as appears in the plan hereon and therein, in outline coloured green, commencing at a point on the Tutaekuri River at the junctions of Sections A and B of same block; thence south-westerly, bearing 210° 15', two hundred and fifty (250) links; thence south-easterly, bearing 155° 30' four thousand and sixty (4060) links, and bearing 159° 30', one thousand three hundred and fifty (1350) links to Te Mingi; thence to a curvilinear line along south-east side of Te Mingi; thence southerly, bearing 164° 15', two thousand six hundred and fifty (2650) links, and bearing 161° 45' two thousand seven hundred and fifty-five (2755) links; thence easterly, bearing 69° 30', one thousand (1000) links; thence northerly, bearing 360° 0' fifty (50) links; thence again easterly, bearing 60° 30', one thousand nine hundred (1900) links; thence north-westerly along the bed of the Tutaekuri River in a curvilinear line to the commencing point: which said Omarunui Block 3N is delineated on the public map of the said District of Napier, in the office of the Inspector of Surveys, at Auckland, originally granted the 14th day of July, 1866, under the hand of Sir George Grey, K.C.B., Governor of New Zealand, to Paora Totoro and Rewi Haokore, aboriginal natives. In witness whereof I have hereunto signed my name and affixed my seal, this 15th day of December, 1874, at eleven o'clock, a.m.—Signed in the presence of Hans. Turton and W. A. Connell, District Land Registrar of the District of Hawke's Bay."

5. The said District Land Registrar, on the 15th day of December, 1874, issued the said certificate to the defendant, and the same certificate is still in the defendant's possession uncanceled.

DEMURRER AND REPLICATION.

On Wednesday, the 22nd day of June, 1875.

The plaintiffs, by their solicitor, Charles Beard Izard, say that the after-plea by the defendant pleaded herein is bad in substance.

The matters of law intended to be argued are,—(1.) That a change in the nature of the title of the defendant to the land in the declaration mentioned, made during the pendency of the suit, and which does not vest or purport to vest any interest in the land in any other person than the defendant, cannot defeat the right of action which had accrued to the plaintiffs at the time of the commencement of the suit. (2.) That the said after-plea does not allege that this suit is not within any of the exceptions contained in section 129 of "The Land Transfer Act, 1870." (3.) That the said after-plea does not allege that the plaintiffs were not deprived of the land in the after-plea mentioned, by fraud, as against the person registered as proprietor of such land, through fraud.

And by way of replication to the said after-plea, the plaintiffs say—(1.) That they deny all the material allegations in the said after-plea contained.

And for a second replication to the said after-plea,—(2.) That the certificate of title in the said after-plea mentioned was the certificate of title issued upon the first bringing of the land in the said certificate mentioned under the provisions of "The Land Transfer Act, 1870," and that for a long time prior to and at the date of the issue of the said certificate to the defendant, the applicant for the same, and continuously thereafter to the present time, the plaintiffs and Hohaia, and other aboriginal native persons, were adversely in occupation of the land in the said certificate mentioned, as against the defendant, and were and are rightfully entitled to such land.

And for a third replication to the said after-plea, the plaintiffs say—(3.) That they repeat the statements made in the declaration contained, and say that they were deprived of the land in the said certificate mentioned by fraud on the part of the defendant, and that the defendant, knowing that he was not rightfully entitled to the said land, or to any interest therein, by fraud, caused himself to be registered as proprietor thereof.

And the plaintiffs claim—(1.) That a perpetual injunction may be issued, restraining the defendant from selling, mortgaging, or in any wise dealing with the said certificate of title, and with the land comprised therein. (2.) That the District Land Registrar of the district within which the said land is situate may be directed to cancel the said certificate of title, and to substitute in lieu thereof a certificate in the name of the plaintiffs. (3.) That they may have such further or other relief as to this honorable Court shall seem just.

JOINDER IN DEMURRER.

On the 15th day of June, 1875.

The defendant, by John Nathaniel Wilson, his solicitor, saith, as to the demurrer to the after-plea herein pleaded,—(1.) That the said after-plea is good in substance.

REJOINDER TO FURTHER REPLICATION.

And as to the first replication of the said after-plea,—(2.) That he gives and takes issue thereon.

And as to the second and third replication to the said after-plea,—(1.) That he denies all material allegation therein contained.

On the 3rd day of August, 1875, motion was made by Mr. Travers, as counsel for the plaintiff Rewi Haokore, for a decree in his behalf. At the same time the demurrer came on to be heard. Cause was shown in the first instance on behalf of the defendant.

The learned Judge took time to consider his judgment, and on the 28th day of September, 1875, delivered the following judgment:—