

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. Skyppe* (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 Dennen'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-