

—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.