

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