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."