In the Supreme Court,
WELLINGTON DISTRICT.

IN THE MATTER OF THE HOROWHENUA BLOCK XIV.

JUDGMENT OF THE CHIEF JUSTICE.

Before answering in detail the questions submitted by the Native Appellate Court it is I think desirable that the opinion I have formed upon the governing question in the case should be stated.

The most important point is what was the Jurisdiction intended to be conferred on the Appellate Court by the 4th Section of "The Horowhenua Block Act 1896" with regard to certain portions of land therein specified and particularly a portion of land therein spoken of as "division 14." It is not in contest that this portion of land and the other portions or divisions were once parts of a larger block known as the Horowhenua Block, the title to which had in 1874 been so far ascertained that a Certificate had been issued under the 17th section of the Act of 1867, with the name therein of Major Kemp alone, but as to which there were a large number of registered owners, that on a subdivision of this land in 1886 by the Native Land Court, that Court had by several Orders purported to subdivide the whole Block into fourteen subdivisions of which "division 14" was one, and that a Land Transfer Title was in due course given for some or all the subdivisions, but certainly for Division 14. Now on the one hand it is contended that when the Legislature by "The Horowhenua Block Act 1896" declared null and void the Land Transfer Certificate of Division 14 and enacted that "The Native Equitable Owners Act 1886" should for the purposes of the Horowhenua Block Act be revived and that to enable *cestui qui* trusts to become certificated owners, the Native Equitable Owners Act should apply amongst others to Division 14, it was intended by the Legislature that the Court should as to this Division 14 first ascertain whether on the Subdivision of the Block, and the creation of Division 14 as one of the divisions it was intended at the subdivision proceedings either by the Court or by the registered owners as evidenced by their proceedings in Court that division 14 should be taken by Major Kemp subject to some, and if so, what trust or at any rate not as sole beneficial owner.

On the other hand it was contended that it did not appear from the Horowhenua Block Act that the Jurisdiction by that Act given to the Native Appellate Court was so limited but that it was intended by that Act that the Appellate Court should ascertain whether or not the so-called trust in favour of registered owners which had been created over the whole Block by reason of the Certificate under the 17th section of the Act of 1867 granted in 1874 with the name therein of Kemp alone, and the 145 registered owners had as to that part of the Block described as Division 14 been in due course of law terminated. It was

herein contended that if in the proceedings on the subdivision, the Native Land Court had not with regard to Division 14 followed the directions of the Native Land Acts regulating the preliminaries to and the proceedings in the subdivision, then the so-called trust arising out of the Certificate under section 17 remained as to Division 14 unaffected by the subdivision. I am of opinion that the latter contention is not admissible, and that the first contention is the one which is supported by a purview of the Horowhenua Block Act. If it had been intended by the Legislature that the Native Appellate Court should ascertain whether or not the Native Land Court had in its subdivision proceeded in due course of law the main and substantial provision would not have been as it is, that the Appellate Court should proceed under and exercise the Jurisdiction conferred by the Native Equitable Owners Act. That Act was passed for the purpose of ascertaining whether in any given case a person though appearing on the title to be absolute owner had when obtaining that title been intended to hold not for himself alone, but for others or for himself and others, that is admitting the validity of the title of the apparent owner, the Court was to inquire whether though the person named in the title appeared to be absolute owner he was nevertheless affected by an intended trust. It was not within the scope of that Act for the Native Land Court to ascertain whether by reason of faulty proceedings in the Native Land Court a title had been obtained which ought not to have been obtained or which was intended should not have been obtained.

It was contended on behalf of the opponents of Major Kemp that section 15 of the Horowhenua Block Act is an independent section conferring all the powers of "The Native Land Court Act 1894" and "The Native Land Laws Amendment Act 1895" and that whatever revising, correcting or nullifying powers are conferred by these Acts are exercisable as to Division 14.

But the answer to this is that these powers are given for the purpose of carrying out the provisions of the Act. The purposes of the Act are as I understand it the ascertaining by the exercise of the Jurisdiction given by the Native Equitable Owners Act whether there was any and if so what intended trust and if a trust then for whom and the conferring of individual titles on any found to be entitled as beneficiaries. For these purposes the powers referred to in section 15 would be exercisable. The Native Equitable Owners Act contains but few provisions: it seems in that Act to have been taken for granted that the ordinary powers of the Native Land Court would be exercisable in the carrying out of the Act. Section 15 of the Horowhenua Block Act is for the purpose of providing expressly as to the Native Appellate Court, in exercising Jurisdiction under the Horowhenua Block Act, for what was assumed in the Native Equitable Owners Act to be the case with regard to the Native Land Court in exercising jurisdiction under the Equitable Owners Act.

Taking the view I do of the scope of the Horowhenua Block Act the fact (if it be so) of the Native Land Court in the subdivision proceedings acting upon insufficient evidence of a voluntary arrangement not formally recorded, or omitting to formally cancel the Certificate granted under section 17, or other such matters are not subjects for enquiry under the Horowhenua Block Act with regard to Division 14. I think that the Appellate Court cannot go behind the Native Land Court Subdivision Orders. There is of course one matter upon which the Orders are not conclusive. They are not conclusive on the question whether Major Kemp or others, though intended to appear sole beneficial owners, were intended not to be so in reality, but to hold subject to some trust.

The Subdivision Orders were in due form signed and sealed by the presiding Judge, Mr. Wilson, alone. This is in accordance with the law. The Assessor does not sign and seal such Orders. It appears that the approval of the survey of the piece of land affected by the Order relative to Division 14 was by the Judge alone, and without previous notice by advertisement. Even if there were any irregularity or something more than irregularity in this, the matter is not one for inquiry by the Appellate Court under the Horowhenua Block Act. Even if it had been, I should have been inclined to the opinion that in subdivision proceedings each order must be deemed provisional till the whole subdivision is completed by actual survey. It seems to be alleged as a grievance going to the validity of the Order for Division 14 that after the Order for Division 11 was made for 15,000 odd acres, being the balance of the land on the West of the railway line, the Order for Division 14 was made for 1200 acres on the Eastern side of the railway line, but that as upon survey of the 1200 acres it was found that 1200 acres could not be given without trenching upon some other Divisions already ordered the Division 14 ought to have gone short: at any rate, should not have had the deficiency made up out of Division 11 on the West of the railway line. As already stated I incline to the view that any order on subdivision, though made prior to another, is so far provisional that it may have to be rectified as to location and even as to area when the Orders come to be completed by actual survey.

What seems to have taken place was that Warena Hunia, to whom, conjointly with Kemp, Division 11 was ordered, agreed that the deficiency in No. 14 should be made up from the 15,000 acres in Division 11, and that it is said by the opponents of Kemp that the agreement was ineffective, as Warena Hunia and Kemp, though the only names in the Order for Division 11, were not solely interested in that Division, inasmuch as they held it on behalf of themselves and a large number of others. It is unnecessary to determine whether such an agreement by trustees, if free from fraud, would be binding on the beneficiaries or not. There might be much to support it. If the Native Land Court could, upon the deficiency for Division 14 being ascertained, open up the subdivisions, it does not seem beyond the powers of the representative owners to come to some agreement

in order to prevent delay and expense and trouble of opening up the subdivisions by the Court.

However, it is not necessary to determine this question. It is not in my opinion a subject for inquiry by the Appellate Court. I have now stated my own opinion upon the governing point in the case and upon some of the more important questions.

The answers to the questions put by the Appellate Court are the answers of the Court.

JUDGMENT OF DENNISTON, J.

I agree with the Judgment of His Honor the Chief Justice. The case stated by the Native Appellate Court propounds for the consideration of this Court no less than eighteen questions, raising a very much larger number of minute issues. The manner in which the questions have been framed was the subject of comment during the argument.

Many are obscurely worded, and almost all are framed argumentatively and in a way to suggest predetermined conclusions by the Court. These peculiarities of form were however admittedly owing to the fact that they were mainly framed on the formal propositions submitted by counsel in the argument before the Court, and it is to mention this only that I refer to the matter.

What answer is to be given to the questions, and as to a number of them, the question whether it is necessary to answer them at all, depend upon the result of a preliminary enquiry into the meaning and object of the Act under which the Appellate Court in this matter derives its jurisdiction, "The Horowhenua Act 1896," and what was intended to be the scope of the enquiry under it. It was contended in the first place that the Act contained a legislative assumption, and consequently a legislative enactment, that section 14 of the Horowhenua Block was in fact trust property. In this I am quite unable to concur. There is nowhere any specific statement to that effect. The Act recites the fact that a Commission had sat to enquire into the Horowhenua Block, and that it was expedient to, as far as practicable, give effect to the recommendations of such Commission. But it does not profess to accept the findings of that Commission; and it neither states such findings or recommendations nor incorporates them directly or by reference. The preamble is a mere statement of the reasons for passing the Act. Section 4, which was relied on to support the contention I am dealing with, begins "to enable '*cestuis que trustent*' to become certificated owners of certain portions of the said block." The provisions of "The Native Land Court Act Amendment Act 1889" shall apply to certain divisions of the Block, including

Division 14. This, in my opinion, does not even in form assume that there must be *cestuis que trustent* as to all these divisions. It must, I think, be read, "to enable the *cestuis que trustent*, if any."

It might have been better to have used clearer language. The draughtsman has evidently had recourse to section 2 of "The Native Trusts and Claims Definition and Registration Act 1893," but has, I think, omitted to notice that the concluding words of the paragraph from which the form is taken alleges the fact that the lands the subject matter of the section had been granted to persons who had been selected to be trustees for themselves and others, but who had been placed by such grants in the position of absolute owners of such land. This of course made the opening words clear and unambiguous.

There are no such words in the Horowhenua Act, and their absence is a significant indication of the intention of the Legislature. Nor do I think, can any such inference be drawn from the language of section 10. The Public Trustee, or some party other than the grantee, and the person whose dealings are impugned must of course be entrusted with the initiative as to any proceedings to attack such dealings. The Supreme Court has ample powers to deal with any breach of trust or any fraud which would entitle any person prejudiced thereby to legal redress. The limitation of time to six months may reasonably be attributed to the conviction that proceedings should not be unduly protracted, and to the belief that proceedings in all the Courts might reasonably be expected to be concluded within six months. It would require of course the plainest and most explicit words to compel a Court to conclude that the Legislature had not only cancelled the Land Transfer Certificates which barred the way to enquiry, but had predetermined, without any judicial investigation, one of the principal questions in controversy between the parties. An Act which takes away from an individual a status which he has acquired in due course of law, and which retrospectively subjects his property to special disabilities and to investigation under special conditions and by a new tribunal, is not to be loosely construed. Legal rights, if destroyed, must be destroyed by express words and not by a strained and doubtful inference.

We have next to ask whether the intention in the Act was confined to re-enacting for the purposes stated in the 4th section of the Native Equitable Owners Act 1886 and Amendments. That is the only directly empowering section, unless sections 14 and 15 can, as contended, be held to confer further special powers. I do not think that these sections can be held to be more than giving to the Court the powers and jurisdiction of the acts therein mentioned, so far as necessary in the words of section 15 for the purpose of carrying out the provisions of the Act.

The section refers only to procedure. The empowering provisions of the Act must be sought in the other sections. The words "special powers" are, I think, satisfied by the provisions of section 4, which, besides re-enacting the

Equitable Owners Act, provides specifically for specially dealing with the interest of any person found to be a trustee.

The empowering provisions of the Native Equitable Owners Act are contained in a few lines. If it had been intended to give any larger power, particularly if it had been intended to give the extensive power now contended for, I cannot understand why it was necessary to re-enact that Act at all. What then are the powers conferred by the Native Equitable Owners Act? Under it the Court had power, upon the application of any Native claiming to be beneficially interested, to make enquiry into the nature of the title to such land, and into the existence of any intended trust affecting the title thereto. According to the result of such enquiry the Court may declare that no such trust exists, or, if it finds that any such trust does, or was intended to exist, then it may declare who are the persons beneficially entitled.

Power is further given to make orders under which the persons found to be beneficial owners are to be deemed to be such owners as if their names had been inserted in the Certificate of Grant. What is meant by making enquiry into the nature of the title? Was it intended that under it the Native Land Court should have power on the motion of any Native who chose to assert that he was beneficially interested in land held by another Native on what was on the face of it a good title granted in due form by a competent Court, to go behind such title and investigate and pronounce on the validity of that title, or upon the proceedings or jurisdiction of the Court which purported to grant it? If so, then one is surprised that during the currency of the Act it should have been thought at any time necessary to apply to this Court, as to lands within the Act, for certiorari or other proceedings to test the validity of any title or proceeding. The contentions made in the present case and entertained by the Court, at least, so far as to submit them for the opinion of this Court, show how far the construction now contended for may be pushed. It is suggested that it is open to the Court to examine into the constitution of the Native Land Court which made the subdivision of 1886 to ascertain whether it complied with certain preliminary formalities as to cancellation of certificates and generally to ascertain whether it had jurisdiction to make the order of subdivision. It is, I think, a much more reasonable construction of the Statute to say that it was intended to be confined in the first instance to ascertaining the nature of the title to the property which the applicant claimed to be beneficially interested—that is, to finding out who had, at the time of the investigation, been declared the owners of the land under the proceedings of a competent tribunal, and that it was not competent for the Court to challenge the procedure of such tribunal, and in effect set aside the existing title. Having ascertained this, it has then to determine whether, at the time such title was granted, the person or persons who, on its face, are absolute owners were really intended to hold the land in trust for other persons. This, I have always understood, is the construction which has been put upon the Statute

JUDGMENT OF MR. JUSTICE CONOLLY.

The Judgment which I am about to read is that of Mr. Justice Denniston.

I have not thought it necessary to prepare a separate Judgment, since I concur in his Judgment and also in that of the Chief Justice, and we are all agreed upon the answers to be given to the questions submitted by the Native Appellate Court.

ANSWERS TO QUESTIONS set out in Case stated by the Native Appellate Court under Section 92 of "The Native Land Court Act 1894," for the opinion of the Supreme Court.

The Court answers the questions as follows :—

To the 1st—

That it is not material to the present case whether the 56th section of the Act referred to does so require, or whether it was or was not imperative that the requirements referred to should have been complied with.

To the 2nd—

We answer that the land may be deemed to have effectively vested in Kemp as beneficial owner notwithstanding the matters mentioned in this question if the Appellate Court is satisfied of the intent of the Native Land Court in making the order.

To the 3rd and 4th—

It is answered that the questions are on immaterial matter.

To 4a—

We answer that the competence of the Court on the occasion referred to is not a matter for inquiry.

The matters upon which the 5th and 6th questions are put were not argued.

To the 5th, 6th, 7th, 8th, 9th and 10th—

We answer that the matters upon which the questions are put are not subjects for inquiry.

To the 11th—

The answer to this question is that the land is not subject to the trust on the ground mentioned.

To the 12th—

We answer that as the matters referred to in this question are not subjects for inquiry no other answer is necessary.

To the 13th—

The answer to this question is in the negative. The subject for enquiry is not whether the Native Land Court in creating Division 14 conducted the proceedings with due attention to the law prescribing the preliminaries to or regulating the proceedings in the subdivision.

To the 14th—

The answer to this is that though Judge Wilson's evidence ought not to be disregarded, but on the contrary, ought to be accepted as of great weight, it is not to be treated as conclusive but weighed with other evidence.

To 14a—

The answer to this is in the affirmative.

To the 15th—

The answer to this is in the negative. With regard to the exception made in the question we answer the question apparently involved in that exception, that the Orders are to be taken as valid, but not as conclusive that the person named in the Order was absolute or sole beneficial owner.

To the 16th—

The answer to this question is that the subject for decision is not whether it was validly agreed, but whether the Native Land Court proceeded upon a determination that it had been so agreed.

To the 17th—

The answer to this is in the negative.

To the 18th—

The answer to the first part of this question is in the negative, and to the last part in the affirmative.