

Another preliminary observation I have to make, without casting any aspersion on Sir Walter Buller. I think he has placed himself in this inquiry in a most unenviable position. He is acting here as counsel for Major Kemp, and he himself is personally interested in the decision in this case as the purchaser, lessee, and mortgagee from Major Kemp of portions of the block. However anxious he might be as counsel to lead the evidence in such a direction as would do justice to the beneficial owners and Major Kemp, the strong pecuniary and personal interest he is under must interfere to obliterate all facts, all claims, all evidence which would in any way militate against his own advantage, lying as it does in the direction of proving Major Kemp an owner, and in that direction only. That this has influenced the evidence led in this case I do not say, but Sir Walter Buller was, in my opinion, most ill-advised to accept the dual position he occupies.

And now, your Honours, to turn to a different matter I think it right to mention. In a sense, I consider it both useless and almost a presumption to address the Court, constituted as it is, at any length on this case. No remarks of mine can induce this Court to alter its opinion. Your Honours have far more experience, a far more intimate knowledge of Natives and Native manners, and, I am sure, just as clear if not a clearer view of the main facts and outlines of this case than I have. But I, nevertheless, consider it my duty to lay before the Court the salient facts from the point of view which the Crown, as represented by myself, takes of the case. For, apart from the great importance of this case, it may be that the bearing of some small detail looked at from a slightly different standpoint may assist the Court in establishing more clearly its own conclusion, or may, on some point or other, suggest to the Court a modification of its previous conclusion.

With these preliminary remarks I shall now turn to the case itself, and, having shortly premised what I regard the matter for this Court's decision, and the position Major Kemp has taken up, I shall divide my statement into three broad divisions. Firstly, I shall lightly touch upon the facts of the case as I understand them, which facts seem to me to conclusively show that Block 14 was never given or allotted to Major Kemp for his own individual benefit. Secondly, I shall endeavour to show your Honours how and when this theory arose that Major Kemp is the beneficial owner of this Section No. 14, and the various steps by which it attained to its present proportions. Thirdly, I shall deal shortly but very carefully with the evidence of various witnesses; and in regard to this last branch of the subject I shall, during the course of my address, have to comment in very grave terms upon certain evidence. In anticipation I will only say this: Most of Major Kemp's principal witnesses are tied by their evidence to his theory, and his whole theory. One and all of them have sworn to that theory in its entirety. If the Court holds that part of the theory is absolutely untrue, the Court must (this is a very important point) disregard the whole story, for such a result proves three things—(a) That each witness has lied; (b) that they have conspired together to lie; (c) that the whole story is a fabrication, and that the Court can put no faith in any part of it.

I will now turn to the case, and will premise my comments by stating briefly what I submit to be the scope of this Court's functions. It seems clear that the whole point for the decision of this Court is a simple one. Was the piece of land now called No. 14 at or prior to 1886 validly given by the real owners to Major Kemp? Now, that is exactly the point upon which my learned friend Sir Walter Buller wishes to avoid a decision. He wishes to complicate the matter by legal difficulties as to the effect of the proceedings subsequent to the Court of 1886. He wishes the Court to be bound not by what the owners really did, but by what Judge Wilson, on no evidence at all, assumed that they did, and what Judge Wilson, without jurisdiction, did. It is just such a position as this that the Equitable Owners Act, as I read it, was framed to avoid. And I submit that, once having decided who were the owners before the Court of 1886, this Court has only to decide whether or not those persons really, and apart from all legal proceedings, intended to give and did validly give this land to Kemp for himself beneficially. For that purpose this Court need only determine who were the owners in 1886; which, if any of them, were at the Court in 1886; if all of them, or some on behalf of all, were entitled to dispose of this land; and if the necessary persons did dispose of it by giving it to Major Kemp beneficially.

Now, the Court will remember that this is an application not by any of the *cestuis que trustent*, but by Major Kemp, who is applying to the Court to declare him beneficial owner of this piece of land. Sir Walter Buller, acting on Major Kemp's behalf, has taken upon himself to establish the following position: That Horowhenua No. 14, as now existing, represents what was agreed to by the owners, and in pursuance thereof allotted at the Court of 1886 to Major Kemp as his own share of the lands subdivided by that Court (exclusive of Horowhenua No. 11). To establish this he propounds to this Court the following theory of fact: (a) An offer and rejection out of and prior to the Court of 1886 of a section of 1,200 acres at Ohau, later on at the Court called No. 14, to certain of the descendants of Te Whatanui; (b) a subsequent allotment in the Court which sat in November, 1886, of a substituted piece of land to those persons, and no definite dealing in the Court with that first piece of land; (c) an agreement outside and during the sitting of the Court of 1886 by the persons whose consent was necessary that Kemp should retain that first piece of land as his own individual share, and an award by the Court to him of that land; and (d), as a consequence, that this confers upon Major Kemp a title to a section of land—(1) of same area, 1,200 acres; (2) in part—say, 610 acres—of land then alleged to have been given and awarded; but (3) in part—say, 589 acres—of land in different situation and in a section (No. 11) awarded in the names of Kemp and Warena Hunia, admittedly in trust as a residential block for a large number of the other persons, and this without any consent of the beneficial owners of that section previously had or obtained. That is the Herculean task in the province of fact and of law that Major Kemp has taken upon himself to prove.

Part I.

The Facts.—In the year 1886, when the Court sat at Palmerston for the purpose of subdividing the Horowhenua Block, it would be well to clearly have in the Court's mind what were the relative