Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Barker v. Edger and others, from the Court of Appeal of New Zealand; delivered 3rd August 1898.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD DAVEY.
SIR HENRY STRONG.

[*Delivered by Lord Hobhouse.*]

The questions raised in this appeal concern the jurisdiction and procedure of the Native Land Court of New Zealand. The Plaintiff, now Appellant, seeks a mandamus directed to two Judges and two Assessors of that Court requiring them to hear and determine a matter depending before them, and also seeks an Injunction to restrain the other Respondents from proceeding with claims made by them in the Validation Court. He is met by two objections. One is that the proceedings in the Validation Court have ousted the jurisdiction of the Native Land Court. The other is that the matter pending in the Native Land Court is one which by the constitution of that Court itself is incompetent to it, being a rehearing of judgments given by the Judge of First Instance.

The constitution of the Native Land Court is regulated by two Acts of Parliament passed in 1886 and 1888. It was established mainly for the investigation and determination of titles

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to "Native Land." Certain terms which enter into this discussion are by Section 2 of the Act of 1888 defined as follows :—

"'Native' means an aboriginal native of New Zealand and "includes half-castes and their descendants.

"'Land' means any land in the colony owned by natives "except Native Land.

"'Native Land' means land in the colony owned by "natives under their customs or usages but of which the "ownership has not been determined by the Court.

"'Person' includes a person whether native or otherwise."

There are a number of sections relating to the important subject of partition. Section 75 of 1886 runs as follows :—

"As to partition it shall be lawful for any person, and as "to other business it shall be lawful for any native, who feels "himself aggrieved by the decision of the Court, or for the "Governor to apply for a rehearing provided the application "be made within three months after such decision is given. "Such application shall be made to the Chief Judge in "writing."

This rehearing is in effect an appeal, because by Section 24 of the Act of 1888 it is enacted that it shall be determined by a Court of not less than two Judges and one Assessor none of whom shall have adjudicated on the case at any former time. A decision on a rehearing is final and conclusive (Section 78 of the Act of 1886).

In the year 1889 was passed the Poututu Jurisdiction Act under which the present controversy arises. It is one of the Acts which have been passed for bringing within the jurisdiction of the Native Land Court subject matter not contemplated by the principal Act of 1886. The recital and Sections 2 and 3 must be read at length. The recital is—

"That there was then pending in the Native Land "Court sitting at Gisborne an inquiry into the rights of "several parties natives and Europeans claiming interest in "certain blocks of land known as Poututu A B and C "Gisborne District, and that there were involved in the said "litigation the interests of other parties not then before the "Court both Europeans and natives claiming adversely to the "aforesaid parties, and also some of them claiming interests in "other blocks described in a certain deed dated the 23rd June

" 1885 (thereinafter called " the said deed ") made between " Wiremu Paraone of the one part and Perceval Barker (the " present appellant) of the other part, and purporting to be " pledged by that deed as security for the performance of the " contract therein described as made between the said Wiremu " Paraone and Perceval Barker respecting the said Poututu " Blocks A B and C; and that it was desirable that the said " Court should be empowered to settle the whole of the " litigation and claims arising out of the transactions recorded " in the said deed and to make all such orders and decrees and " issue all such land titles as should be required for the settle- " ment of all the said conflicting interests and for determining " all debts claims and demands existing or claimed to exist " between the parties asserting any of the aforesaid rights or " claims."

Then it enacts—

" Sec. 2. The Native Land Court shall have full juris- " diction to inquire into adjust and settle all accounts claims " and matters in dispute between the parties whether natives " or Europeans making claims to all or any of the several " blocks of land mentioned and described in the said deed, and " to make all such orders and decrees as shall be necessary for " such purpose and for the purpose of giving such titles to the " land described in the said deed as the said Court shall think " fit, which orders and decrees shall be final and conclusive and " binding upon all the said parties and upon the said lands, and " the said Court is empowered to make orders declaring such " of the parties as shall appear to be entitled thereto to be " owners of such estate or interest in any of the said lands as " to the said Court shall appear just.

" Sec. 3. Every Order declaring any person to be the owner " of any of the said lands shall be prepared and executed and " dealt with in the same manner and have the same effect as " an Order made by the Court in partition in the exercise of " its ordinary jurisdiction ; and when such Order has been made " and issued it shall thereupon be lawful for the Governor by " warrant under his hand to direct the Land Registrar of the " district within which the land is situate to issue to the " person in whose favour such Order is made a certificate of " title."

It is clear from the recital that Blocks A B and C are native land already within the jurisdiction of the Native Land Court, and actually being dealt with by that Court. It appears from the Respondent Tucker's pleas in this suit (Rec. p. 13), that the other blocks have been the subject of prior adjudication in the ordinary jurisdiction of the Native Land Court; and from his case lodged in this Appeal (para. 6)

that he also claimed them by purchase in an execution sale, so that they cannot be native land according to the definition of 1888. It must be taken that the main reason for passing the Act was to bring under one authority an area of land subject to a group of claims all connected together, but some of which were not within the competence of the Land Court because they related to non-native land or to collateral money transactions and matters of account. This is stated by Mr. Justice Williams in the Court of Appeal. "Not only therefore is the "Court authorised to determine the titles to "particular land which the Court apart from "the Act would have had no authority to "determine, but the Court is empowered to "determine questions of account which may "arise not only between natives but between "Europeans and natives, and even between "Europeans."

On the 23rd April 1892 Mr. Justice Barton presiding in the Native Land Court delivered judgments on matters in difference between the Appellant and the three non-official Respondents concerning the title to Poututu lands. On the 21st July 1892 the Appellant applied for a rehearing. On the 9th December 1893 an order for rehearing was made by the then Chief Justice Seth-Smith. In the meantime a new Court had been established by an Act which came into force on the 6th October 1893 and is called, at least in this argument, the Validation Act.

The proceedings before the Land Court went on, and it appears from the judgments of the Court of Rehearing (Rec. p. 10) that a great multiplicity of matters were put in in order so that every question might be finally settled on a sitting to begin 25th May 1895. On that day the Court met when it appeared that the three non-official Respondents, Tucker, Wiremu Pere and

Peka Kerekere had commenced litigation in the Validation Court respecting the lands; the two natives as Plaintiffs, and Tucker as Defendant. All three Respondents contended that by force of the Validation Act as amended in 1894, the commencement of proceedings in the Validation Court was to stay proceedings in all other Courts, even current proceedings in the Native Land Court under the Poututu Act. The learned Judges of that Court yielded to this contention, while pointing out the extreme inconvenience and hardship of such a result. They therefore stayed the proceedings, and the consequence was the present action for mandamus in the Supreme Court.

The action was heard before Mr. Justice Conolly on the 18th November 1895. That learned Judge held that the Validation Act did not affect the proceedings in the Native Land Court; notwithstanding the general provision that the commencement of proceedings there shall operate as a stay of proceedings in any other Court in respect of the same matters. But on the construction of the Poututu Act itself he held that Section 2 means that the order of the Judge of First Instance is to be final and conclusive, and that the Act contemplates only a single hearing.

The three Judges of the Court of Appeal were divided in opinion. Chief Justice Prendergast held that when new subjects are added to the jurisdiction of the Native Land Court they fall into its ordinary course of procedure, and that the reference in the Poututu Act to orders for partition was intended to give to Europeans the right to ask for a rehearing in matters of title which otherwise the Native Land Acts would only have given to natives. Mr. Justice Williams, with

whom Mr. Justice Dennistoun agreed, thought otherwise. If their Lordships rightly understand the reasoning of those learned Judges they think that even independently of the words "final and conclusive" in Section 2, that section is so constructed as not to convey any right in the suitor to demand or any power in the Court to grant a rehearing. They say "the "rehearing clauses in the Native Land Acts "appear to be applicable only to matters in which "the general jurisdiction of the Court attaches, "and not to matters essentially different placed "within the jurisdiction of the Court by special "legislation, and in respect of which the orders "and decrees of the Court are declared to be "final and conclusive." And in another passage they say "Furthermore, the only order as to "rehearing that the Chief Judge can make is "with respect to the whole or any part of the "land, or the title thereto. The right of re-"hearing is therefore expressly confined to the "case where the title to particular land has "been the only question decided by the Court of "First Instance." On such grounds they conclude that if any effect at all is to be given to the words "final and conclusive" it must be that they prevent the right of rehearing attaching in all cases within the scope of the Act. Then in dealing with Section 3 they start with the conclusion that the right to rehearing is negatived by Section 2, and therefore orders affecting title are to be dealt with as partition orders "in respect of which the right of rehearing is taken away." (Rec. p. 23.)

As regards the effect of the Validation Act the learned Chief Justice and Mr. Justice Williams both agree with Mr. Justice Conolly, while Mr. Justice Dennistoun does not examine the point. Taking that point first, their Lord-

ships are clear that the decisions below are right. The general maxim is, *Generalia specialibus non derogant*. When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim. The Legislature found an area of land comparatively small in extent to be the subject of intricate disputes in which both Europeans and natives took part. Some of those questions fell within the scope of the Native Land Court and others did not. It was for the benefit of all parties that a single tribunal should adjudicate on the whole group of questions. Therefore, as Mr. Justice Williams has stated, a new authority was given to the Native Land Court as regards both land and matters of account. It would require a very clear expression of the mind of the Legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four years before, and to which the Court had ever since been assiduously addressing itself.

Moreover their Lordships asked during the argument whether it was clear that the Validation Court had jurisdiction over all the matters comprised in the Poututu Act. No very clear answer was given at the Bar. On examining the Act it appears much more probable that the jurisdiction given to the Validation Court is at the utmost only partial. By Section 2 the term "land" is defined as "land owned by or vested in natives under any "title whatsoever, except land the ownership of

" which has not been determined by the Native " Land Court." The jurisdiction is confined to controversies connected with land so defined. Now so far as the lands dealt with under this Poututu Act are found to be vested in Europeans, to which effect these claims certainly are, they cannot fall within the definition; and so far as the specified blocks are found to be vested in natives their ownership is still the subject of inquiry in the rehearing and has not been determined by the Native Land Court, and they therefore are not within the definition. Their Lordships do not intend to decide these points which have hardly been argued before them. But they are obviously points which require close attention. And it supplies a strong reason against any intention to stay proceedings under the Poututu Act summarily and abruptly by the mere commencement of proceedings under the Validation Act, if the capacity of the Validation Court to comprehend within its jurisdiction the whole of the Poututu disputes is on the face of it improbable and could only be proved, if at all, after elaborate investigation. The Legislature could not have intended to displace the complete and precise jurisdiction adapted to the special case of Poututu, or to put it in the power of a defeated litigant to so displace it, without substituting something equally complete and precise in its place.

As regards the jurisdiction to rehear, their Lordships have to express disagreement with the Court of Appeal. They cannot see by what words the rehearing given by the Native Land Courts Acts is confined to cases where the title to particular land has been the only question decided by the Court of First Instance. If such a decision is embodied in the same decree with other matters not of an appealable nature it still remains appealable. It may be that the

other questions need not be opened at all. But what disputes may or must be opened in hearing an appealable decision must be decided according to the circumstances of each appeal. Their Lordships do not understand how the right of rehearing expressly given can be taken away because the same decree touches matter which taken by itself is not of an appealable nature.

The opinion given that the rehearing clauses apply only to the original range of jurisdiction and not to new subjects brought within it is the very point in dispute, and it must be determined entirely by the language which the Legislatures have used with reference to the subject-matter. Their Lordships do not enter into the question discussed below on the subject of Probates. That turns on a different Act and is not before them. On the Poututu Act their only substantial ground for doubt is that they find themselves at variance with other judicial minds. The language itself raises no doubt in their minds. The decision which is to be final and conclusive is that of the Native Land Court. That means such decision as the Court finally comes to according to its own constitution and procedure. One class of its decisions, those relating to partition, is subject to rehearing at the instance of any suitor, while only Natives may ask for rehearing of all classes of decisions. The Poututu Act says that orders such as are described in the concluding words of Section 2 and the opening ones of Section 3, viz., decisions on title to land, shall be dealt with in the same manner as an order made by the Court in partition in the exercise of its ordinary jurisdiction. That conveys to the mind the notion that with respect to decisions upon title Europeans as well as natives are allowed to ask for rehearings. The learned Judges think that the prescribed

application of partition practice to Poututu land orders is satisfied when other processes of a more ministerial and consequential character provided by other sections are applied. As to these other processes the sections which provide them allow for the effect of rehearings; and the view of the learned Judges must in consistency exclude not only Section 75 but important parts of other sections which they say are embodied in the Poututu Act. Their treatment of the case seems to their Lordships to involve a departure from very plain express language, and the substitution of unexpressed conjectural qualifications not to be implied from the new character of the subject matter brought within the Native Land Court, or from any other part of either Act.

Their Lordships are informed that since the institution of this suit the position of the Native Land Court has been altered, and that a mandamus in the terms of the Plaintiff's prayer would be unsuitable. The Parliament of New Zealand however appears to have avoided interference with this litigation, and to have preserved the judicial machinery necessary for settling it. It will be better now to do no more than declare the rights of the parties, and to make an order as to the costs.

Their Lordships will humbly advise Her Majesty as follows: — First to declare that according to the true construction of the Poututu Jurisdiction Act 1889 the Plaintiff Percival Barker was on the 21st July 1892 entitled to ask for a rehearing of the judgments of His Honour Judge Barton, Nos. 6 to 10, and that the Native Land Court had the power to grant such rehearing; secondly, to declare that the commencement of proceedings by the Respondents Wiremu Pere and Peka Kerekere in the Validation Court did

not operate to stay the proceedings in the Native Land Court in respect of such rehearing; thirdly, to order the two last-named Respondents and the Respondent William Henry Tucker to pay the Plaintiff's costs in both Courts below. The last-named three Respondents must also pay the costs of this appeal.