Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Frederick Wallis and Others v. *His Majesty's Solicitor-General for the Colony of New Zealand, from the Court of Appeal of New Zealand; delivered the 10th February* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This is an Appeal by persons claiming to be Trustees of a certain charitable endowment in New Zealand against an Order of the Court of Appeal of that Colony. The Order appealed from was made at the instance of the Crown on the occasion of an application by the Trustees asking for the approval of a scheme for the administration of the Charity.

The effect of the Order was to pronounce the endowment null and void from its very commencement and to discharge the Trustees from all active duties in connection with it, declaring the Charity property to have become the property of the Crown but leaving it still in the hands of the Trustees and for the time being at least apparently derelict.

So far as the evidence goes there can be no dispute about the facts. The documents relating to the foundation of the Charity are on record. The earliest of those documents in point of date and the most important is an instrument not under seal which in accordance with the legal

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phraseology in use in the Colony is described in a subsequent Crown grant as a "deed" of cession. It is in fact a letter addressed to Sir George Grey, the Governor of New Zealand, by certain native chiefs and leading men among the Maoris who were then in possession of lands called Witireia in the District of Porirua near the south-western extremity of the northern island. The body of the letter is in the following terms :—

"Otaki, 16th August 1848.

"Friend Governor Grey,

"Greeting—It is a perfect consenting on our part that "Witireia shall be given up to the Bishop for a College. We "give it up not merely as a place for the Bishop for the time "being but in continuation for those Bishops who shall follow "and fill up his place to the end that religion or faith in "Christ may grow and that it may be as it were a shelter "against uncertain storms—that is against the evils of this "world. This is the full and final giving up of that place as "a college for the Bishops of the Church of England."

It is in evidence that some of the donors and those the leading men amongst them were converts to Christianity who had been educated under the superintendence of the Right Reverend George Augustus Selwyn, then Bishop of New Zealand, at St. John's College, Auckland. That College, founded by the Bishop and named after his own College at Cambridge, was established for the purpose of providing religious education, industrial training and instruction in the English language for Her late Majesty's subjects of all races and of children of poor and destitute persons being inhabitants of islands in the South Pacific. It was a flourishing institution and regarded as a powerful factor in the civilisation of the country. The Bishop, as is well known, had acquired an extraordinary influence in New Zealand. His striking personality, his devotion to his Master's service and his zeal for the welfare of the Maori race had produced a profound impression on the native mind. It

cannot be doubted that it was the object of the donors so far as in them lay to imitate the Bishop's example and to make some provision towards the establishment of an institution like the Auckland College near their own homes in the south of the island. The cession is in terms an absolute, unqualified, and unconditional dedication to charity the general purpose or end of which is declared to be "that religion or faith in "Christ may grow."

The Government at the time warmly commended the action of the native donors. The answer to their letter has not been put in evidence but its tenor may be gathered from the following minute dated the 7th of October 1848, and signed by the Lieutenant-Governor which is printed in the Record :—

"Acknowledge this and say that I shall have much pleasure "in sanctioning this giving up a portion of their reserves at "Porirua for the benevolent and useful purpose of founding "a College and that I will communicate their offer to the Lord "Bishop. Such laudable and generous conduct will be made "known in England and cannot fail of insuring the commen- "dation of all good men and the Queen will rejoice in seeing "her Maori subjects setting so good an example to the "Europeans.

"When they wish I will send over a surveyor that they may "indicate the quantity and boundaries of the land they wish "to transfer to the Bishop that a plan may be made and the "arrangement completed.

"E. EYRE,
"Lieutenant-Governor."

The Governor, it will be observed, sanctioned the proposed cession and undertook to give effect to it without attempting to make any stipulation condition or reservation of any sort or kind. As the law then stood under the treaty of Waitangi the Chiefs and Tribes of New Zealand and the respective families and individuals thereof were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands as they pleased subject only to a right of pre-emption in the Crown. It was not until 1852 that it was

made unlawful for any person other than Her Majesty to acquire or accept land from the natives, 15 & 16 Vict. 72, s. 72. The founders of the charity therefore were the native donors. All that was of value came from them. The transfer to the Bishop was their doing. When the Government had once sanctioned their gift, nothing remained to be done but to demarcate the land and place on record the fact that the Crown had waived its right of pre-emption. That might have been effected in various ways. The course adopted was to issue a Crown grant. That perhaps was the simplest way, though the Crown had no beneficial interest to pass. After all it was only a question of conveyancing as to which the native owners were very possibly not consulted.

In accordance with the Governor's suggestion the land intended to be included in the cession was marked out and surveyed. It was found to comprise about 500 acres. On the 28th of December 1850 the arrangement was completed by the issue of a Crown grant with a plan annexed. The Crown grant contained the following introductory recitals :—

"Whereas a school is about to be established at Porirua "under the superintendence of the * * * Bishop of New "Zealand for the education of children of our subjects "of all races and of children of other poor and destitute "persons being inhabitants of islands in the Pacific Ocean. "And whereas it would promote the objects of the said "Institution to set apart a certain piece or parcel of land in "the neighbourhood thereof for the use and towards the "maintenance and support of the same which piece or parcel "of land has by a Deed from the natives been ceded for the "support of the said school."

The grant was expressed to be made to Bishop Selwyn to hold to him and his successors "in "trust nevertheless to and for the use and towards "the maintenance of the said school so long as "religious education, industrial training and "instruction in the English language shall be "given to the youth educated therein or "maintained thereat."

In the year 1859 under the provisions of the Bishop of New Zealand Trusts Act, 1858, Bishop Selwyn conveyed the charity land to certain Trustees nominated by the General Synod of the Church in New Zealand in communion with the Established Church of England. The present Appellants are their successors in the trust.

The land at the date of the cession was rough land covered with scrub and apparently difficult of access. In order to improve it and make it available for pastoral purposes (the only use to which it could have been put at the time) Bishop Selwyn spent out of his own moneys a sum of about 200*l.* which is said to have been more than the then value of the land.

No school or college has as yet been erected on the land or in the neighbourhood of it. The land has been let from time to time as grazing land and the Trustees have invested and accumulated the rents and profits.

In 1897 the accumulations amounted to a sum exceeding 6,000*l.* The land had increased in value but owing to the falling off of the native population the neighbourhood had become unsuited for the purpose of a school or college such as that contemplated by the original donors. In these circumstances the General Synod of the Church resolved that an application should be made to the Court for directions as to the administration of the charity. In the first instance the Trustees communicated with the Law Officers of the Crown sending them a copy of a proposed statement of claim and draft scheme. The office of Attorney-General was then vacant. The matter came before the Solicitor-General. After a delay of three months he returned an unsatisfactory answer. He said that Ministers desired to consult Parliament on the general subject of such trusts during the coming Session and that he was therefore precluded from

approving the proposed scheme. He suggested that the Trustees should defer proceeding further for the present, adding by way of encouragement or warning that "the position now taken by the Government" was "not necessarily hostile" to the interests which the Trustees represented.

In deference to the suggestions of the Solicitor-General the Trustees waited until the end of the Session and then, as nothing had been done in Parliament, they applied to the Court for the approval of the proposed scheme.

The Solicitor-General in the absence of the Attorney-General was made a party. He put in a defence. In his defence he took a line which must seem somewhat strange to those who are familiar with the administration of charitable trusts in this country. It is the province of the Crown as *parens patriæ* to enforce the execution of charitable trusts and it has always been recognised as the duty of the Law Officers of the Crown to intervene for the purpose of protecting charities and affording advice and assistance to the Court in the administration of charitable trusts. The Solicitor-General however adopted a very different course. He seems to have thought it not inconsistent with the traditions of his high office to attack a charity which it was *primâ facie* his duty to protect. He suggested that the Crown was or might be entitled to the property. In the event of his failing on that point, which was the principal ground of his defence, he submitted a scheme in which the original trusts of the charity were apparently ignored altogether.

The case came on to be heard before the late Chief Justice, Sir James Prendergast. That learned Judge rejected the Solicitor-General's contention that the endowment had reverted to the Crown and declined to allow an amendment proposed at the hearing by which it was sought to impeach the validity of the Crown Grant. He

decided with more hesitation than the case seems to have required, that the general purpose of the foundation was charity and that the doctrine of *cy-près* was applicable. He did not, however approve the scheme proposed by the Trustees as he thought it was not shown by the evidence before him that it was impossible for them to establish a useful school in the neighbourhood with the funds at their disposal. At the same time he thought it clear that the Trustees were right in their objection to the scheme proposed by the Solicitor-General. In these circumstances he reserved the matter for further consideration.

The case was afterwards brought up on further consideration before the present Chief Justice, Sir Robert Stout and Edwards J. Evidence was adduced which satisfied the Court that it would be a waste of the trust moneys to erect a school at Porirua. A fresh scheme was proposed and adopted with some modifications to which the Trustees assented. The Solicitor-General renewed his objections but the Court held that it was bound by the decree made on the original hearing.

The Solicitor-General then appealed to the Court of Appeal upon the following grounds :—

"1. That the funds and lands have reverted to the Crown "either absolutely or as trustee upon a failure of the objects "and purposes of the Crown grant and are not subject to "administration by or under direction of the Court *cy-près*.

"2. That no general charitable purpose existed or is proved "either in the native donors or the Crown but only a purpose "of creating a specific school at a specified site and the funds "and lands are therefore not subject to administration by "or under direction of the Court *cy-près*."

The learned Judges of the Court of Appeal allowed the Appeal and entered judgment for the Solicitor-General. They did not however adopt or even notice either of the grounds put forward by the Solicitor-General. They were of opinion they said that the land and money had become the property of the

Crown for two reasons. In the first place they thought "the grant had become void on "the ground that it sufficiently appeared from "the evidence that Her Majesty was deceived in "Her grant." In the second place, assuming that a school satisfying the terms of the grant had been at one time established, they held that the duration of the trust must have come to an end because the trust was only to last "so long "as religious education, industrial training and "instruction in the English language should be "given to the youth educated therein or main-"tained thereat." Now as it is common ground that no school was ever established at or in the neighbourhood of Porirua, it would seem to follow that the occasion on which the trust, according to the construction placed on the grant by the Court of Appeal, was to cease and determine never arose and never could have arisen. It appears therefore hardly necessary to consider the second ground on which the Court of Appeal determined the case in favour of the Crown. It was not pressed at their Lordships' Bar.

The learned Counsel for the Respondent were in much the same difficulty in attempting to support the first ground upon which the Court of Appeal relied. There too the Court had recourse to an assumption which has no basis in fact. What evidence is there that the Crown was deceived? Absolutely none. The evidence is entirely the other way. The Governor undertook to complete the arrangement proposed by the native donors as soon as he received their letter. He did not even wait to communicate with Bishop Selwyn. It is not suggested that he communicated on the subject with anybody else. Now it would be absurd to found a charge of misrepresentation on the letter of the native donors. But if the native donors were innocent,

with whom is the blame to rest? The evidence which the Court of Appeal said was sufficient to prove misrepresentation was discovered by them in the introductory recitals of the Crown grant. But the grant is not a deed *inter partes*. The statements in it are the statements of the Crown. The statement that a school was "about to be "established at Porirua" is just as consistent with an intention on the part of the Governor to establish the school by the aid of public money, or an expectation on his part that the announcement in England of the generosity of the native donors, coupled with the approval of Her Majesty, would bring in ample funds for the object in view, as it is with the supposition of representations made to the Governor by some unknown persons interested in procuring this grant from the Crown. If the representative of Her Majesty was unduly sanguine—if he did think that the hopes and aspirations of the native donors would attain a speedy consummation—that is no ground for suggesting that the Crown was deceived. And indeed expectations which may now seem to have been over-sanguine or even unfounded might not improbably have been fulfilled if it had not been for the Maori war and the removal of Bishop Selwyn to an English See before the war was finished.

After all what does the statement in question come to? The Crown grant says that "a "school is about to be established at Porirua." That does not imply that the school was to be established within any fixed and definite period of time. The Governor must have known the circumstances as well as anybody. He knew that so far nothing whatever had been contributed towards the establishment of this school but a piece or parcel of land for the present wholly unprofitable. How could he have been deceived into thinking that the school was to be

established in the immediate future? Suppose someone at his elbow with more sense and foresight than he seems to be credited with had pointed out with effect, that many hindrances might arise—that there might be a native war—that the Bishop might be removed and that the school might not be established for 50 or even 100 years—would that have altered the action of the Governor? It might have modified the language of the Grant. It might perhaps have led to the omission of the word "about" or to the substitution of the expression "intended to be" for the words "about to be" or to the adoption of some other phrase not obnoxious to hypercriticism. But the substance of the transaction would not have been altered. The attitude of the Governor would have remained just the same. What the Governor was looking to when he welcomed the offer of the native donors was not the immediate establishment of a school but the effect that the action of the natives would produce in the Colony and above all in England. Why should the Court attribute to a Government of the past more than childlike simplicity in order that the Government of to-day may confiscate and appropriate property which never belonged to the Crown and which the Crown encouraged the rightful possessors to dedicate to charity?

The learned Counsel for the Respondent feeling that they could not support the Judgment of the Court of Appeal on either of the reasons assigned fell back on the argument suggested by the Solicitor-General that there was no general purpose of charity but only an intention to erect "a specific school on a specified site." But that is a very narrow view of the transaction at variance in their Lordships' opinion with the express terms of the gift and opposed to principles laid down in recognised authorities such as *The*

Attorney-General v. *The Bishop of Chester*, 1 B. C. C., 444, and *The Incorporated Society* v. *Price*, 1 J. and L., 498. Counsel also dwelt on the length of time which has elapsed since the date of the original gift without anything having been done in the way of establishing the proposed school. But it is well settled, as stated in Tudor's Charitable Trusts, 3rd ed., p. 53, that where there is an immediate gift for charitable purposes the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect or will not of necessity take effect within any definite limit of time and may never take effect at all. In support of this proposition the learned writer cites a number of authorities, the latest of which is *Chamberlayne* v. *Brockett* (8 Ch. 206) before Lord Selborne, L.C.

So far their Lordships have treated the case as if the Order under appeal had been made on a proper application and in a suit properly constituted. In fact however the application was entirely irregular and the suit was not one in which such an Order as that obtained by the Solicitor-General ought to have been made. It is contrary to the established practice of the Court to permit a Defendant to an action for the administration of the trusts of a settlement not void on the face of it to impeach the settlement in his defence to that action. If he thinks he has a case for setting aside the settlement or having it declared null and void, he must attack it openly and directly in an action or counter-claim in which he comes forward as Plaintiff. Any other course would be inconvenient, embarrassing, and unfair. The present case affords a good illustration of the propriety of the rule. The Solicitor-General declined his proper duty and refused to bring an information. The Trustees were compelled to come forward as Plaintiffs. The Solicitor-General put in a defence. He submitted that the Crown might be entitled.

The case of the Crown was launched in a half-hearted fashion. The point was suggested rather as a difficulty in the way of administration than as a claim to property. In argument before the late Chief Justice the Solicitor-General seems to have become rather bolder, but his contention was disregarded. Then he appealed to the Court of Appeal asserting that property of which the Crown was never possessed had "reverted" to the Crown. But the validity of the charitable trust was not in issue in the suit. There could be no issue in that suit between the Crown and the Charity. There was no evidence adduced on behalf of the Crown. There was no one put forward by the Crown who could be cross-examined on behalf of the Charity. The native donors whose claim would at any rate be superior to that of the Crown and whose interest is alternately magnified and ignored by the Solicitor-General were not represented either directly or indirectly. Then on the hearing of the Appeal the Solicitor-General applied for and obtained leave to amend his defence. A formal order for the amendment was afterwards obtained on the ground that such amendment was necessary "to more clearly define the "grounds of defence of the Crown." But the amendment only made the confusion worse. It was a medley of allegations incapable of proof and statements derogatory to the Court. But the Court accepted it and treated it with extreme deference. The learned Judges intimate pretty plainly that if they had not been able to find satisfactory reasons for deciding in favour of the Crown, the amendment would of itself have prevented their making an order in favour of the Trustees. The amendment divides itself into two parts. In the first place it asserts that the Crown has come under some undefined and

undisclosed obligations to the natives. The Court seems to think that this assertion must place the Court "in a considerable difficulty." Why? Why should a Court which acts on evidence and not on surmise or loose suggestions pay any attention to an assertion which, if true, could not have been proved at that stage of the proceedings and which the evidence in the cause shows to have been purely imaginary. According to the evidence the only obligation which the Crown undertook was to waive its right of pre-emption. The view of the Court of Appeal is to be found in a passage towards the end of their judgment which runs thus: "What the original rights of "the native owners were, what the bargain was "between the natives and the Crown when the "natives ceded the land, it would be difficult if "not impossible for this Court to inquire into, "even if it were clear that it had jurisdiction to "do so." Their Lordships are unable to follow this observation. The land was part of the Native Reserves as appears from the Government Minute of the 7th of October 1848. At the date of the cession to Bishop Selwyn the rights of the Natives in their Reserves depended solely on the treaty of Waitangi. There is not in the evidence the slightest trace of any cession to the Crown or of any bargain between the Crown and the Native donors. Of course if the Crown comes forward as Plaintiff, the transaction may assume a very different complexion. There may be in existence evidence which has not yet been disclosed. But if the Crown seeks to recover property and to oust the present possessors, it must make out its case just like any other litigant. All material allegations must be proved or admitted. Allegations unsupported go for nothing. Notwithstanding the doubts expressed by the Court of Appeal it is perfectly clear that the Court has jurisdiction to deal with a claim to

property made on behalf of the Crown when properly brought forward. It has no right to decline jurisdiction. Still less has it a right to stay its hand at the instance of a claimant who may present a case into which it may be difficult, if not impossible, for the Court to enquire, even though that claimant be the Crown. The second part of the amendment to which also the Court seemed disposed to yield is more extraordinary still. It asserts that "the executive "Government has determined * * * that "any departure from the precise terms of the "grant by the application *cy-près* of the * * "land and funds without the assent of the "Parliament of the Colony would contravene "the terms of the * * * cession and be a "breach of the trust thereby confided in the "Crown." "We see great difficulty" say the learned Judges, "in holding that in such "circumstances the Court could or ought to "interfere." The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand or even to the intelligence of the Parliament. What has the Court to do with the Executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the Executive? Why should the Executive Government take upon itself to instruct the Court in the discharge of its proper functions? Surely it is for the Court, not for the Executive, to determine what is a breach of trust. Then again what has the Court to do with the prospective action of Parliament as shadowed forth by the Executive? No one disputes the paramount authority of the Legislature. Within certain limits it is omnipotent. But why should it be suggested that Parliament will act better if it acts in the dark and without

allowing the Court to declare and define the rights with which it may be asked to deal? The present Chief Justice, who was not a party to the judgment of the Court of Appeal, took a truer view of the situation when he said that the approval of a scheme could not "in any way hamper either "the Government or the Parliament in dealing "with this trust."

In the opinion of their Lordships the Respondent has been wrong in every step from first to last. Their Lordships will therefore humbly advise His Majesty that the Order of the Court of Appeal should be discharged except as to the direction therein contained for payment of the costs of the Trustees; that any costs paid under that Order to the Solicitor-General should be returned; that this Appeal should be allowed with costs to be paid by the Respondent and that the Trustees should be at liberty to retain any extra costs incurred by them as between solicitor and client out of the trust fund in their hands.