

AME GAVIDI *v.* THE POLICE

[Appellate Jurisdiction (Carew, A.C.J.) May 4th, 1949]

S. 209 (1) (a) of the Penal Code—criminal trespass—s. 349 of the Penal Code—damaging property—licence or permit required under the Native Land Trust Ordinance—s. 3 of the Native Lands Ordinance—Fijian custom.

The appellant was convicted by the Magistrate's Court, Lawaqa, on 12th November, 1948, on two charges of criminal trespass, contrary to section 209 (1) (a) of the Penal Code and on charges of damage to the property of Asesela Turea contrary to section 349 (1) of the Penal Code.

Asesela Turea was given permission to plant on the land the subject of the trespass by the native owners, members of the Tokatoka Namara. No formal licence or permit was drawn up but the transaction took place in accordance with native custom by agreement with members of the Tokatoka, the Turaga-ni-Mataqali and the Roko Tui. Asesela Turea was not a member of the Tokatoka and evidence was given that the practice of allowing a native who is not a member of the Mataqali to plant crops on land is customary throughout Fiji.

It was argued on behalf of the appellant at the lower Court and on appeal that as Asesela Turea had entered upon the land without the consent of the Native Land Trust Board he was not lawfully in possession.

On appeal by the accused.

HELD.—The provisions of the Native Land Trust Ordinance do not repeal by implication section 3 of the Native Lands Ordinance and do not deprive natives of their customary rights in regard to land.

[EDITOR'S NOTE.—Section 3 of the Native Lands Ordinance reads as follows:—

“ 3. Native lands shall be held by native Fijians according to native customs as evidenced by usage and tradition. Subject to the provisions hereinafter contained such lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs and subject to any Regulations made by the Fijian Affairs Board and approved by the Legislative Council, and in the event of any dispute arising for legal decision in which the question of the tenure of land amongst native Fijians is relevant all Courts of law shall decide such disputes according to such Regulations or native customs and usage which shall be ascertained as a matter of fact by the examination of witnesses capable of throwing light thereupon.”]

Cases referred to:—

Re Chance (1935) 1 Ch. 266.

Re Cuno (1889) 43 Ch. 12.

Mayor of Yarmouth v. Simmons (1878) 10 Ch. 518.

Re Wainwright (1843) 1 Phil. 253.

K. A. Stuart for the appellant.

S. B. Patel for the respondent.

CAREW, A.C.J.—For the appellant it is argued that Asesela Turea had no licence or permit, as required by the Native Land Trust Ordinance (Cap. 86), and was a trespasser; he therefore had no rights, and the appellant was wrongly convicted. The Magistrate was wrong in deciding that, as the permission was granted in accordance with native custom, a licence under the Native Land Trust Ordinance was not necessary, the matter being covered by section 3 of the Native Lands Ordinance (Cap. 85). This section first appeared as section 3 of the Native Lands Ordinance, 1905, and it then contained a proviso and subsections which were not re-enacted. Section 3 of the Native Lands Ordinance, 1905, contained the words, "subject to the provisions hereinafter contained" which had reference to the subsequent provisions of the 1905 Ordinance dealing with leases. There were no provisions in this Ordinance dealing with licences to occupy land. This Ordinance was repealed. It is now replaced by the Native Lands Ordinance (Cap. 85) and the Native Land Trust Ordinance (Cap. 86). The Native Lands Ordinance (Cap. 85) deals with that part of the 1905 Ordinance which had reference to the Native Lands Commission; and the Native Land Trust Ordinance (Cap. 86) concerns itself with that part of the 1905 Ordinance which dealt with leases, as well as some new matter, including licences to occupy land.

By Ordinance No. 35 of 1933, a Fijian was given the right to apply for the sole occupation of native lands for the purpose of growing crops thereon and, on approval, to have an agreement drawn up. Ordinance No. 35 of 1933 was repealed by the Native Land Trust Ordinance (No. 12 of 1940). This Ordinance also repealed the proviso to subsection (1) of section 3, subsections (2) and (3) of section 3, and sections 4 to 20, both inclusive, of Ordinance No. 1 of 1905. These repealed sections dealt mainly with leases. The provisions of Ordinance No. 35 of 1933 were not re-enacted, but section 8 of the Native Land Trust Ordinance, No. 12 of 1940, provides that "no licence in respect of native land shall be granted save under and in accordance with the provisions of this Ordinance." Section 5 (1) provides that "the control of all native land shall be vested in the Board . . ." The Native Land Trust Ordinance, No. 12 of 1940, appears in the Revised Edition of the Laws as Chapter 86.

It is contended that section 3 of the Native Lands Ordinance (Cap. 85) as it stands now is meaningless. No regulations were made under this section by the Fijian Affairs Board. The words "subject to the provisions hereinafter contained" have no meaning because the provisions of this Ordinance which follow section 3 cannot in any way qualify section 3. The provisions to which the original section (section 3 of the Native Lands Ordinance, 1905) referred are now contained in the Native Lands Trust Ordinance (Cap. 86), and it is submitted that section 3 of the Native Lands Ordinance (Cap. 85) can have reference only to these. The words "Native Land Trust Ordinance" should thus, it is argued, be supplied by implication and read into section 3 of the Native Lands Ordinance (Cap. 85). On this construction, then, section 3 would be limited by the Native Land Trust Ordinance, and a licence to occupy the land would become necessary. If the words "Native Land Trust Ordinance" are not interpolated, section 3 of the Native Lands Ordinance (Cap. 85) becomes ineffective and should be regarded as having been repealed by implication by the Native Land Trust Ordinance (Cap. 86).

For the Crown it is submitted that the Native Land Trust Ordinance (Cap. 86) has no application to customary transactions, which fall within section 3 of the Native Lands Ordinance (Cap. 85). Customary permission to plant is not a licence as contemplated by the Native Land Trust Ordinance (Cap. 86).

Section 3 of the Native Lands Ordinance (Cap. 85) deals with the tenure of the native lands and recognizes the customary rights of natives to cultivate, allot and deal with such land amongst themselves. These rights would seem to be limited by the words "subject to the provisions hereinafter contained", and by regulations made by the Fijian Affairs Board. No regulations, as far as I am aware, have been made by the Fijian Affairs Board; and it is therefore necessary to decide whether the section is effected by the words "subject to the provisions hereinafter contained".

In regard to the principle which is to be observed in supplying words by implication, I would refer to the remarks of Lord Lyndhurst, L.C., in *re Wainwright* (1843) 1 Phil. p. 253:—

"It is not the Court's province to supply an omission in an Act; and if such correction would extend the penal scope of an Act, still less would the Court be inclined to correct. . . . But where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is usual to supply the words."

In giving to section 3 the construction urged by Counsel the penal scope of the Native Land Trust Ordinance (Cap. 86) would be extended to the Fijian Asesela Turea who would become liable to a penalty under section 28 of the Native Land Trust Ordinance (Cap. 86) for being in unlawful occupation of the land. Secondly, it cannot be said, and it has not been urged, that words have been accidentally omitted from the section.

It remains, then, to consider whether, without the interpolation, the section is deprived of all meaning. I shall deal with this in considering whether the Native Land Trust Ordinance (Cap. 86) in effect repeals by implication section 3 of the Native Lands Ordinance (Cap. 85).

Maxwell on Interpretation of Statutes, 9th Ed., at p. 173, deals with repeals by implication as follows:—

"A repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute book or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless escape from it is more likely to be in consonance with the real intention."

In *Re Chance* (1935) 1 Ch., p. 266, *Farewell, J.* said:—

"But I think it is right to say this; that where a later Act does in terms repeal various earlier Statutes, or sections of Statutes, and does not include in those repealed sections and Statutes the particular Statute in question, the Court is forced to the conclusion that such an enactment must be treated as repealed, then it must do so, but I think it should not do so unless it is impossible to put any reasonable meaning on the later section without implying the repeal of the earlier act."

Section 3 of the Native Lands Ordinance (Cap. 85) undoubtedly confers customary rights on the native Fijian, but the construction sought on behalf of the appellant to be placed on it would take away those rights. *Bowen, L.J.*, said in *Re Cuno* (1889) 43 Ch., p. 12:—

“In the construction of statutes you must not construe the words so as to take away rights which already existed before the Statute was passed, unless you have plain words which indicate that such was the intention of the Legislature.”

It would seem that rights are not to be taken away or even hampered by mere implication from the language used in the Statute unless, to use the words of *Fry, J.* in *Mayor etc. of Yarmouth v. Simmons* (1878) 10 Ch. at p. 518, “the Legislature clearly and distinctly authorize the doing of something which is physically inconsistent with the continuance of an existing right.” Words taking away the right should be clear and unambiguous.

Having regard to the authorities to which I have referred, I do not think that the provisions of the Native Land Trust Ordinance (Cap. 86) ought to be read into section 3 of the Native Lands Ordinance (Cap. 85) so as to take away the customary rights of the natives to deal with land amongst themselves. Nor do I think that the provisions of this section concerning the customary rights of the natives to deal with land amongst themselves can be regarded as being repealed by implication by the Native Land Trust Ordinance (Cap. 86). The provisions creating these rights were, it would seem, deliberately left unrepealed by the Native Land Trust Ordinance and they can, I think, be reasonably construed.

There are no provisions anywhere in the Native Lands Ordinance (Cap. 85) after section 3 qualifying the customary rights of natives to cultivate, allot or deal with land amongst themselves, nor have any regulations on the subject been made by the Fijian Affairs Board. The section must, therefore, be taken as it stands.

It remains, then, to determine whether the transaction between Asesela Turea and the native owners of the land falls within this section. In my opinion it does. It follows, therefore, that he is not a trespasser.

Appeal dismissed.