THE ATTORNEY-GENERAL *v.* RATU ILISONI TABUYALEWA

[Appellate Jurisdiction (Hyne, C.J.) September 18th, 1953]

Trespass on Crown Lands—s. 34 Crown Lands Ordinance—s. 14 of Land (Transfer and Registration) Ordinance—title of Crown to land.

The respondent trespassed on Crown land at Navai and was prosecuted under the provisions of section 34 of the Crown Lands Ordinance, 1945.

Counsel for the respondent at the trial by the 1st Class Magistrate at Ba submitted at the close of the case for the prosecution that the Crown never acquired a valid title to the land in question. The Magistrate acquitted the accused for this reason.

On appeal against the acquittal.

HELD.—The title of the Crown to the land in question having been registered the register is conclusive evidence that the person named therein is the absolute and indefeasible owner of the land and this title shall not be the subject of challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party or on the ground of adverse possession in another.

Cases referred to:—

Assets Company Ltd. v. Mere Roihi (1905) A.C. 176.
Blake v. Midland Railway [1904] 1 K.B. 503.
Coulson v. Disborough [1894] 2 Q.B. 316.
Creelman v. Hudson Bay Co. (1920) A.C. 195.
Gibbs v. Messer (1891) A.C. 248.
Regina v. Clarke 13 A.E.R. 808.
Regina v. Hughes [1866] L.J. 35.
Waimiha Saw Milling Co. v. Waione Timber Co. (1926) A.C. 10.

W. G. Bryce, Solicitor-General, for the appellant.

N. S. Chalmers for the respondent.

HYNE, C.J.—This is an appeal by the Hon. the Attorney-General against an order of acquittal of the respondent by the Magistrate at Ba of the offence of trespass on certain Crown Land situated at Navai, contrary to section 34 of the Crown Lands Ordinance, 1945.

The learned Magistrate did not call upon the respondent for his defence. He heard submissions by respondent's Counsel at the close of the case for the prosecution and acquitted the accused on the ground that the Crown had never acquired a valid title to the land in question.

It would seem from his judgment that he came to this conclusion on the following grounds:—

(1) That the mode of payment by annual sums payable for an unspecified period was wrong in view of the Native Lands Ordinance, 1905, which, in the opinion of the Magistrate, required payment of a lump sum on the completion of the transaction.
(2) That the signature of the Buli was not attested by the District Commissioner, but by a Magistrate, thus contravening section 9 (2) of the Native Lands Ordinance, 1905.
(3) That by reason of such wrong attestation the Registrar had no power to register the grant, and
(4) That there was no " genuine dealing " with the land, as envisaged by section 14 of the Land (Transfer and Registration) Ordinance (Cap. 120), since " genuine dealing " in that section meant " one that is legal ".

As to the second ground Mr. Chalmers, Counsel for the respondent, admitted the signature of the Magistrate was correct, but intimated that his argument would be that there was no power in the Crown to acquire the land under the Native Lands Ordinance of 1905.

The grounds of appeal filed by the Attorney-General are three in number:—

(1) That the learned Magistrate erred in law in holding that the instrument of title in respect of the said land issued by the Registrar on 20th day of June, 1905, was not conclusive evidence that the Crown was proprietor of the said land.

(2) That the learned Magistrate erred in law in holding that the sale by the Buli of the said land to the Colonial Secretary was *ultra vires* and illegal by reason of the fact that the signature of the Buli to the instrument of transfer of the said land was witnessed by a European Stipendiary Magistrate.

(3) That the learned Magistrate erred in law in holding that the sale by the Buli of the said land to the Colonial Secretary was *ultra vires* and illegal by reason of the fact that the payment of the purchase money was to be made by annual instalments.

He therefore asked:—

(i) that the decision of the learned Magistrate be set aside, and
(ii) that this Court make such further order in the matter as to it may seem just.

In view of the admission by respondent's Counsel, Ground (2) was not argued by the learned Solicitor-General, who appeared for the appellant.

The Solicitor-General pointed out that the Crown had produced a photostat copy of a certificate of title showing the Crown was the registered proprietor, and it also produced a photostat copy of the grant.

It was submitted by the Solicitor-General that this Certificate of Title was issued in accordance with the provisions of the Native Lands Ordinance, 1905.

The grant, Ex. "C", certainly complies with all the requirements of section 9, subsection 2. It is signed by the Buli, and there is a diagram of the land granted. It is also signed by the Native Commissioner and the signature of the Buli is witnessed by the European Stipendiary Magistrate.

That the grant was presented for registration and a Certificate of Title issued in accordance with the Ordinance is clear from Ex. "B" which sets out that the Colonial Secretary, on behalf of the Government of Fiji, is the proprietor of the land referred to in the grant. It is signed by the Registrar of Titles and is dated 20th June, 1905. The title having been so issued it was subject to all the provisions of the Real Property Ordinance, 1876.

Under section 14 of that Ordinance the certificate is conclusive evidence of proprietorship and the title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he shall have been proved to be a party or on the ground of adverse possession in another for the prescriptive period.

Section 14 of the Land (Transfer and Registration) Ordinance (Cap. 120) of the Laws makes a similar provision, but this section makes no reference to transmission or transfer from a registered proprietor.

The section reads as follows:—

> " The instrument of title of a proprietor issued by the Registrar upon a genuine dealing shall be taken by all Courts of law as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party or on the ground of adverse possession in another for the prescriptive period. A duplicate or certified copy of any registered instrument signed by the Registrar and sealed with his seal of office shall be received in evidence in the same manner as an original."

The term proprietor used in this section means, vide section 2 of the Ordinance, a registered proprietor of land, and the Crown has been registered as the owner of this land.

Section 198 of (Cap. 120), while repealing the Ordinance of 1876, specifically provides that such repeal shall not affect any registration effected or instrument of title issued under that Ordinance.

The Crown having a registered title, which has not been cancelled, the respondent cannot go behind this title. I have no hesitation, therefore, in holding at once that the Crown has a valid title to the land since such title has not been cancelled. In view, however, of the nature of Counsel's submissions, I think I should deal with them at some length.

Learned Counsel for the respondent made the following submissions:—

(a) The Crown had no statutory or other adequate authority at the date, 15th June, 1905, to acquire native land.

(b) Even assuming, though denying it had such authority, a native grant as at 15th June, 1905, was and is altogether void because the grant did not comply with the provisions of Native Land Ordinance, 1905.

(c) Since the Native grant was and is void, the Registrar of Titles had no power to register it and to issue a Certificate of Title in respect of it, i.e. he could not thereby convert a bad root of title into a good one.

In support of the first submission Counsel argued that the Real Property Ordinance, 1876, clearly only refers to registered proprietors, and that the terms " registered proprietor " and " Transfer " cannot apply to first transactions in land with native owners who, in the language of section 2, have only " customary right to occupy and use lands ".

It is true that the Real Property Ordinance, 1876, in section 14 refers to transfers by " registered proprietors ". I cannot agree, however, that because the native owners were not registered proprietors within the meaning of the Ordinance a transfer to the Colonial Secretary is for this reason invalid.

The Native Lands Ordinance, 1905, provides for transfer by native owners, and then section 9 provides machinery whereby the transferee becomes a registered proprietor, and the land then becomes subject to all the provisions of the Real Property Ordinance, 1876.

It was argued that there is no express authority in the Native Lands Ordinance, 1905, for the Crown to acquire lands under it, and it was submitted that if the Governor-in-Council exercised powers under section 8 of the Ordinance he could only exercise powers on behalf of the Native Owners whose interest it is his duty to protect. He could not also acquire land and exercise powers on behalf of the Native Owners whose interests it is his duty to protect. He could not also acquire land under the Ordinance. Counsel referred to *Halsbury Vol.* 13, p. 196, paragraphs 185 and 186, submitting that in the present case the Governor had fiduciary duties to discharge in relation to the natives. There was, therefore, it was submitted, a conflict of duties as between his office of Governor as representing the Crown and, on the other hand, as Governor protecting the interests of natives.

There may be some substance in this, but, as I shall presently indicate, the Crown can purchase land and the grant specifically states that the land was sold to the Colonial Secretary on behalf of the Government of the Colony of Fiji. It would seem clear that the provisions of section 9 of the Ordinance were invoked to give full effect to the transfer, and to secure its registration.

If it be necessary to show statutory authority that the Crown has a right to purchase land—and I do not think it is—then this is clearly set out in section 2 of the Native Lands Acquisition Ordinance, 1905, which reads as follows:—

> "Nothing in this Ordinance contained shall be deemed to curtail or affect the power of the Governor to purchase or lease native lands by agreement with the owners thereof."

It was contended by respondent's Counsel that the section implied a right to purchase only from and after the enactment of the Ordinance in October, 1905. I do not think so. I agree with the Solicitor-General that the section is a definite recognition and statement of the Governor's right to purchase at any time, either before or after the enactment of the Ordinance.

Counsel for the respondent further contended that the obvious purpose of the Native Lands Ordinance, 1905, was to protect Fijians so that they would not be denuded of all their lands. I entirely agree that the object was to protect them and to ensure that they obtained an equitable price if they sold, or a reasonable rent, if they leased, land. I agree, too, that it is the duty of the Crown to ensure that this protection is given to Fijians when dealing in land, but in my view this does not preclude Government (the Crown) from buying land by private treaty. It cannot be suggested that the Crown when buying native land would pay a price which would be disadvantageous to the native owners.

Learned Counsel referred to paragraph 52 of the Letters Patent, which reads as follows:—

> "The Governor, in Our name and on Our behalf, may make and execute under the Public Seal of the Colony grants and dispositions of any lands or other immovable property which may be lawfully granted and disposed of by Us within the Colony, provided that every such grant or disposition be made in conformity

with some law in force in the Colony, or with some Instructions addressed to the Governor under Our Sign Manual and Signet or through the Secretary of State, or in conformity with such Regulations made by the Governor in that behalf either before or after the date upon which these Letters Patent come into operation, and duly published in the Colony."

Counsel deduced from this that land can only be granted in strict conformity with some Statute, and that, therefore, on a grant from natives to the Crown there must be strict compliance with the Native Lands Ordinance or some other Statute.

I think Counsel has misunderstood the intention and meaning of paragraph 52. As I read it it simply means that grants of land *made* by the Governor must be in conformity with some law in force. It does not mean that grants or sales of land to the Governor must necessarily be in conformity with some law. Government can acquire native lands compulsorily under Statute, or, as I have said, it may purchase by private treaty with natives. There can in my view be no doubt as to Government's right to purchase land from natives and no legislation for the purpose is necessary.

That the title in the present case appears to have been issued under Ordinance No. XI of 1905 does not in my view mean that the Crown must comply with all its provisions. It is not bound by the Ordinance. The land was acquired by purchase and the machinery of the Ordinance would appear to have been used not only to show that the persons purporting to sell had authority to sell, by insisting on certain signatures to the grant as required by the Ordinance, but also to protect Government by securing effective registration of the grant.

It was further argued that the grant was void because the consideration was expressed in terms of annual payments. It was contended that the Ordinance envisaged the payment of a lump sum and it was argued that this contention was supported by reference to Schedule B in which provision is made for the receipt of the sum paid.

Section 9 (1), however, allows latitude as to the form to be used by saying the " form shall be as near thereto as circumstances permit ", i.e. as near to Schedule B as circumstances permit.

Counsel has contended that only slight deviations in form are permissible, and are not permissible in a matter of substance as, for example, consideration.

Consideration is a matter between vendor and purchaser and, to use the language of *Lord Lindley in Assets Co. Ltd. v. Mere Roihi* (1905) A.C., p. 176 at p. 200, " having regard to the long lapse of time and the long undisturbed possession " by the purchaser, and no objection having been taken as to the form of the consideration, I do not think the objection raised by the respondent as to consideration can be entertained at this late stage.

Furthermore, the land was the land of a Mataqali, and it is surely in the best interests of the native owners to provide for annual payments in perpetuity rather than to make a lump sum payment to those who represented the Mataqali in 1905 who could have spent it as they wished, leaving nothing for their descendants.

Continuing his argument, learned Counsel cited the cases of *Regina v. Clarke,* 13 A.E.R. p. 808 at p. 811, and *Regina v. Hughes* (1866) *L.J.* 35, *Privy Council Cases* at p. 53 in support of his contention that the present grant to the Crown is void.

In the former case a grant of land had been made by the Governor of New Zealand, contrary to an Ordinance.

In the latter case the Governor of South Australia authorized to demise certain waste lands not exceeding eighty acres, demised land of a greater extent than eighty acres.

I am unable to agree that these cases support the respondent's contention that the Crown had no right to acquire this land. The cases quoted merely deal with instances where certain officers exceeded their statutory powers when making grants of land to certain persons. No statutory duty is imposed on the Crown under the Ordinance of 1905 as to acquisition of land by the Crown.

It was further submitted by Counsel that the grant could only be registered if the conditions of the Ordinance were strictly complied with.

The duties of a Registrar are as set out in section 31 of the Land (Transfer and Registration) Ordinance (Cap. 120), which re-enacts section 40 of the Ordinance of 1876. The section reads as follows:—

> "The Registrar shall not register any instrument purporting to transfer or otherwise to deal with or affect any land under the provisions of this Ordinance except in the manner herein provided nor unless such instrument be in accordance with the provisions hereof, but any instrument in substance in comformity with the forms annexed hereto shall be sufficient:
>
> Provided that the Registrar shall have power to reject any instrument appearing to be unfit for registration."

A Registrar's duties are, it seems to me, governed by the principle enunciated at p. 203 of the Assets Co. Ltd. case already cited.

The first paragraph on p. 203 reads:—

> "It by no means follows that errors in procedure, even in matters which in one sense affect jurisdiction, need be noticed, or sought to be noticed, by other persons whose duty it is to act on orders brought to them. It is not their duty to attend to such matters; if it were their action would be paralyzed. What they have to look to is the order and, if that is good on the face of it, it is their duty to act upon it, and it must be treated as a sufficient foundation for what they do. Not only are they protected from liability if the order turns out to have been improperly obtained, but if what they do under it is made conclusive on questions of title, a title which might be otherwise impeachable must be treated as valid."

On the face of it the grant of 15th June, 1905, is good, and the Registrar was fully justified in registering the instrument.

It was argued by Counsel that, in accordance with section 14 of Cap. 120. there must be a genuine dealing, and the learned Magistrate's interpretation of "genuine" as meaning "legal" was one of the reasons why it was held that the Crown had no valid title to the land. This interpretation was apparently adopted by the respondent's Counsel.

I am in agreement with the learned Solicitor-General's interpretation of "genuine" based on *Blake v. Midland Railway* [1904] 1 K.B. p. 503 at p. 506; namely that an agreement is genuine if it "truthfully represents the agreement which has been come to between the parties."

On the face of it the grant is certainly genuine and the Registrar could not therefore be expected to investigate before registering. That the Registrar has certain powers of investigation cannot be denied, but when a document on the face of it complies with the requirements laid down as this document, on the face of it, did, he cannot be expected to pursue inquiries as to its genuineness. He was presented with an instrument, duly executed, and he was bound to assume therefore that it was a registrable document.

The title purports to have been issued under Ordinance No. XI of 1905. It is clear that all the formalities stipulated under section 9 were complied with. It is true that section 8 may appear to present some difficulty but, as I have said, there is an undoubted right in the Crown to purchase land from native owners and non-compliance with section 8 does not therefore affect the validity of the grant. Admitting however, as one must, that the Crown has an unfettered right to purchase land from natives, section 8 was complied with because the land was acquired on the report of the District Council and with the consent of the Governor.

I am satisfied that the Crown acquired a valid title to this land in 1905 and that such title could be, and was, properly registered under the Real Property Ordinance, 1876.

The Crown is the registered proprietor of this land and section 14 of the Land (Registration and Transfer) Ordinance applies. Section 198 of that Ordinance, as I have already pointed out, expressly preserves the validity of registration under the 1876 Ordinance.

Counsel for the respondent has, as I have said earlier, argued that the transfer to the Crown was not from a registered proprietor. This, as I have also said, does not mean that the Crown could not get a good title.

In the Assets Co. case at p. 204, *Lord Lindley*, speaking of the case of *Gibbs v. Messer*, said :—

> " Lord Watson, in his observations on the protection given to bona fide purchasers, points out that a bona fide purchaser from a registered owner is in a better position than a first registered owner whose title may be impeached for fraud. But there is nothing in his judgment in favour of the view that an original registered owner, claiming through a real person, does not get a good title against every one, except in the cases specially mentioned in the Act, fraud being one of them."

The title, having been registered, is conclusive evidence that the person named therein is the absolute and indefeasible owner of the land registered and shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party, or on the ground of adverse possession in another.

There is no evidence whatever before this Court, nor has it ever been suggested, that there was any fraud or misrepresentation on the part of the Crown, nor that there was adverse possession in another for the prescriptive period.

In the case of *Waimiha Sawmilling Co. v Waione Timber Co.* (1926) A.C. p. 100 at p. 106, *Lord Buckmaster* quoted, with approval, from the case of *Fels v. Knowles,* 26 N.Z.L.R., p. 604 at p. 620, as follows—:

> " Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest. . . ."

The view taken by the Privy Council as to registered titles is clearly and fully set out in the case of *Creelman v. Hudson Bay Company* (1920) A.C. p. 195 at pp. 196 and 197. This was a case on appeal from the Court of Appeal for British Columbia. The head note reads as follows:—

> "When a company has been granted in respect of land in British Columbia a certificate of indefeasible title under the Land Registry Act (R.S.B.V. 1911, c. 127) purchasers of the land from the company cannot dispute the validity of the title on the ground that the company had no power under its Act of incorporation to hold the land."

In the course of his judgment *Lord Buckmaster* said :—

> "There is a Statute of the Province of British Columbia which regulates the registration of title of property bought and sold within its territory, and that Statute provides that where registration takes place a certificate shall be issued, and that a certificate of indefeasible title issued under the Statute shall so long as the same remains in force and uncancelled be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is seized of an estate in fee simple in the land therein described against the world subject to certain reservations and exceptions which are not material for the purposes of the present case. Such a certificate of registration was obtained by the respondent company on February 5, 1913, and the appellants, realizing that on the words of the section they are unable to dispute the title which the certificate confers attempt to escape from the difficulty by asserting that the circumstances render such certificate wholly void. They assert that the fact that the land was not acquired for the purposes of the company prevents the company being registered, and that as they are unable to be registered, it is impossible that the certificate can grant any title."

He went on to say that in their Lordships' opinion the certificate of title—

> "is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the Statute of registration."

Even, therefore, if there were any irregularity in the original grant—and I do not agree that there was—the Crown, having an indefeasible registered title which has not been challenged, and having been in undisputed possession for nearly fifty years, must be held to have a valid title to the land comprised in the grant.

It has in my view been clearly established that the Crown acquired and has a valid title to the land comprised in the grant. The appeal of the learned Attorney-General is allowed, and the decision of the learned Magistrate is set aside.

The land being therefore Crown land, the matter is remitted to the Magistrate at Ba for hearing, de novo, of the charge against the defendant—the respondent in this appeal.