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trouble and heart-burning, and where, after all, if he is spared the infliction of heavy damages, he must still pay certain sums as a penalty for the failure to complete his bargain. Each party will accordingly bear his own costs.

Judgment for plaintiff without costs.

Oct. 25.

[CIVIL JURISDICTION.]

EVERETT *v.* THE ATTORNEY-GENERAL.

Crown Grant—Land Claim—Representation of Native owners at the Hearing—Practice—Costs.

In an action against the Colonial Government for refusal to issue to the plaintiff a Crown grant which had been signed by the Governor and registered, but which was resisted by the defendant on the ground that it had been signed and registered in error, it appearing that the native owners of the land, the subject of the Crown grant, had interests in it conflicting with those of the plaintiff, the Court ordered that they should be represented by counsel at the hearing. The Attorney-General, who was counsel for the Crown, thereupon put in a *pro formâ* statement on their behalf, simply accepting the pleadings of the Crown.

Held, that this was not sufficient, and that the Native Department should see that the interests of the native owners were properly and separately represented by counsel.

The defendant was ordered to pay the plaintiff's costs occasioned by the delay.

Mr. Thomas for the plaintiff.

The Attorney-General (Mr. Fielding Clarke) for the defendant.

The facts of the case appear sufficiently from the judgment.

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SIR JOHN GORRIE, C.J. In this case there was a hearing on the 15th June last, when, after the evidence of the Colonial Secretary and others had been taken, and hearing counsel, I came to the conclusion that the cause was not ripe for final judgment, that several important questions were opened up which had not been sufficiently dealt with either on the pleadings or arguments; and, above all, I came to the conclusion that the decision in the cause might seriously affect the rights of parties not then before the Court, viz., the native owners of the land which the plaintiff claimed as his, and without whose appearance the judgment, if for the plaintiff, might not end the contention.

The nature of the case may be shortly stated thus:—The plaintiff alleges that a Crown grant—which, after registration, in certain circumstances is indefeasible—had been signed by the Governor and registered, and had thus conferred upon him an indefeasible title to the 546 acres of land contained in the grant; and that it had been improperly kept back from him by the officers of the Government. The defence of the Government is that the Crown grant had been signed and registered in error, and that not having been issued it had not become indefeasible, although registered; and they offered the plaintiff another Crown grant for 139 acres, which they allege is all he is entitled to or that was intended to be granted to him. The evidence taken at the preliminary hearing in June, and, indeed, the course of proceedings in regard to these claims to land upon which Crown grants follow, brought the fact into prominence that a cause had depended in the tribunals for rehearing claims to land between the native owners and the plaintiff, or the Curator of Intestate Estates, who then represented Stewart's heirs.

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The plaintiff necessarily takes up the position that this cause has ended, and that the result of it was that the estate he represents was to receive a Crown grant for the 546 acres as registered. The position of the Crown in contending that the first Crown grant was signed in error and offering another for a less number of acres shows (whatever plea may now be put on record) that it would be very difficult for the Crown to sustain any other proposition also than that the cause had ended in the Court for rehearing, and that in offering the second Crown grant they were carrying out the decision of that tribunal. But the native owners, if properly represented, might contend—and for aught I know might successfully contend—in a manner entirely unhampered by the difficulties of the position already taken up by the Crown, that the cause had not been concluded in the Court for rehearing, and that both Crown grants, whether registered or not, had been prematurely signed while the cause was *sub judice;* and that this Court, pending the ultimate decision of the case in the tribunal appointed for the purpose, could not entertain the questions as raised by the plaintiff. This is a question which is in the cause which must be considered by me, and which I desire to have argued by counsel representing the native owners, as well as to hear the arguments in regard to it by the counsel for the plaintiff and the counsel for the Crown respectively.

Then, again, the question as to the indefeasibility of the title consequent on registration is a most important one for this Colony. Our system of land rights is based on registration, that is, that the act of registration and not the document registered, carries the title. This is the general doctrine on which the plaintiff takes his stand, whether it is applicable in his particular case or not.

Now it is evident that this question might be a very different one if it lay simply between the plaintiff and the Crown—as the grantor of unclaimed and empty lands—and the plaintiff and native owners actually in the ownership and possession of the very lands said to be granted. In the one case, if the plaintiff succeeded, the loss would only be a trifling monetary loss to the Crown consequent on the error of its officers; in the other—as the law of this Colony, differing in this respect from that of some colonies, most properly and justly recognises the native title to land, and obliges courts of justice to take it into account as derived from immemorial native custom—the question might assume the phase of a competition between the two titles, both recognised in law, both good in their own sphere, and requiring most careful consideration whether the action of the Crown, by mistake as alleged, was such, and the state of the law required, the one title to give way to the other, leaving or not leaving a mere question of pecuniary compensation behind. In order to judge of this it would be necessary that the native title should be set forth in the pleadings, and if it be, as I understood the Attorney-General to state on the hearing of this motion, that the natives were not owners by immemorial descent but simply occupants by right of war, the facts ought all the more to be before the Court on the pleadings for the natives or the rejoinders of the parties.

In these circumstances, seeing questions of great moment and difficulty before me, I directed the native owners—as these might be certified by the Chief Native Commissioner—to be called for their interest, and to be represented by counsel on their behalf, in order that, in the determination of the suit, I might hear what some skilled person could say from their point of view, and

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in order that whatever judgment was given it would be final. Of course, I might have taken another view. I might have said to myself, "There is a Native Department of the Government, formed and paid for the purpose of looking after the interests of the natives; and if they, knowing, as they ought to do, of this case, and the important native interest involved in it, do not choose to be watchful, why should I take any trouble about the matter? If the judgment goes for the plaintiff, when he proceeds to enforce it and to turn the native owners off the land, and some complication arises, the Native Department may then become alive to the question and endeavour to open it up anew by the plea that the decision having been *Res inter alios acta*, the native owners were not bound by the decision."

This is not the spirit, however, in which I have thought it right to discharge judicial duty to litigants coming before this Court. This is not the spirit, above all, in which I should ever deem it right to discharge judicial duty in a young country where such questions as those of disputes about land might at any moment lead to serious consequences. This is not the spirit in which I should ever deem it right to discharge judicial duty in a country where the Queen, by her officers and her laws, has shown the utmost solicitude that the rights of the ancient inhabitants of the land shall, equally with those of her British subjects, be cared for and protected. To save all further questions, to inform my mind fully of all that could enter into the consideration of the important issues raised, I directed that all having interest should be brought before the Court, and that those unskilled in European ways, in the procedure of courts, and in the language in which law-suits are conducted, should be represented by some counsel learned in

the law. No appeal was taken from this order, as, indeed, it would have been very strange if there had, since it is the invariable custom in the tribunal for rehearing claims to land where the Governor presides.

The Chief Native Commissioner duly certified that the Kai Waivunigele were the native owners of the lands in question. The plaintiff, after some additional evidence had been taken by commission, moved that the cause be again set down for hearing, mentioning that the Attorney-General, who was counsel for the Crown, had also put in a statement for the native owners. This did not appear to me to be the proper mode, or a satisfactory mode, of implementing the order of the Court, and, on looking at the papers in chambers, I was convinced that the *pro formâ* statement for the native owners put in by the Attorney-General on their behalf, simply accepting of the pleading put in by the Crown, would not bring out the case of the native owners or lead to a satisfactory final judgment. I felt that they ought to be separately represented, and that the counsel appearing for them alone could much more effectually plead their cause and contend that they ought not to be injuriously affected by the blunders of the Crown officers than the counsel who represented the officials or the Government which had made the blunders. The cases requiring to be argued appeared to me to be so separate and distinct, that the interests of the native owners would have run a great risk of being sacrificed to the exigencies of the contention which the counsel for the Crown must primarily and chiefly uphold; and that, failing to hear the real arguments which could be advanced by them, I should in like manner lose the benefit of the reply of the plaintiff's counsel in supporting his plea that the

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registration carried the title absolutely against all comers. In the most considerate way therefore for all parties, I attempted to get my original order carried out in its true intent and spirit, and informed the acting head of the Native Department—who may be regarded as the official guardian of the natives—of my desire. I thought I had succeeded; and, in order to put the proceedings of the cause into shape, issued an order in chambers allowing the *pro formâ* statement for the native owners to be withdrawn, and another substantive pleading to be put in its place, after which the cause would be heard.

In place, however, of taking advantage of the permission I had given, I now find from a communication made by the acting head of the Native Department to the registrar of the Court, and from the contention of the Attorney-General at the bar when the plaintiff's motion to have the cause set down was heard, that my order is resisted by executive authority, both, as I now understand it (however contradictory the position may appear), the order contained in the interlocutory judgment of 15th June last, and the permission to retire the *pro formâ* statement for the native owners of 4th instant. It is something new, or at all events it is happily rare, that the executive should attempt in any manner to interfere with or overrule the procedure of courts of justice. That which has made the courts of England so trusted of the people is that they are known to be absolutely free from executive influence, intermeddling, or dictation in particular causes, either as to the course of procedure or the decisions of the judges. If such freedom from executive control is necessary in a country where the Parliament is so frequently in session to redress wrongs, and public opinion is so minutely informed of passing events, and so quick to act, how much

more necessary is it that the courts of justice in such communities as these should be free and unfettered, where the form of government is arbitrary, and where the fortunes of the citizens may be seriously influenced for better or for worse by the hasty stroke of an official pen. In this case, however, where a necessary order of the Court is resisted, the Crown is one of the litigants and refuses to do what lies in its power in order that the Court may be fully informed of the facts and circumstances and supplied with the arguments which may lead to a right decision. Only once before has any attempt been made to question the authority of this Court during that tenure of office which is now drawing to a close. It was on the occasion of the first native suit being brought, but it only took the shape of a little display of irritation at the result. That, perhaps, might have been looked for at an early period of the history of the Colony; but it could scarcely be anticipated that this Court should now encounter resistance from those, who, above all others, ought to sustain it in the exercise of its functions, that the power of the Court to do the plainest duty which lies upon judges—that of protecting the interests of those who from circumstances are incapable of protecting themselves, and insuring that the litigation in progress should be so shaped as to lead to a final settlement of the questions at issue—should be openly challenged by the counsel for the Crown, and, that the heads of the Native Department should be forced into the position of refusing their assistance to have the interests of the native owners properly and sufficiently brought before the Court for consideration and determination.

Whatever others may consider to be their duty, mine appears to me to be clear. If I were to permit the

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judgments and orders of this Court to be defied and resisted I should undo the work of years, betray the trust that has been confided to me, and transmit to my successor a heritage of difficulty and humiliation. I prefer rather to leave this Court as I found it, with its authority undiminished, and the reputation of its judges (which I hope they possess) for independence in the discharge of their duties untarnished.

I shall, indeed, now be obliged to alter the permission given to retire the *pro formâ* statement for the native owners, and direct the registrar of the Court to put it out of the cause as not being in fulfilment of the order. The plaintiff's counsel has suggested that in the circumstances I should myself appoint a counsel for the native owners, but it is clear that when the Colonial Government has organised a special department for the purpose of guarding native interests it possesses the only available machinery for enabling the order I have already given to be carried into effect. The native owners are a community and not individuals possessing individual rights, and the head of the community is either an officer of or in close correspondence with the Native Department, which, as it also advises in the money concerns of the communities, can arrange for the advance of the necessary preliminary costs, which may or may not hereafter be costs in the cause. Moreover, I cannot but feel that it would be *pessimi exempli* to permit the puerile reasons set forth in the Acting Native Commissioner's letter or memorandum to have any weight with the Court.

I must, accordingly, repeat the order to have the native owners represented in the cause for their interest, as the Crown invariably and properly insists on in the tribunal devoted to the rehearing of land claims; and,

because of the peculiar nature of the cause, by a counsel different from the counsel for the Crown, and who shall put in such pleading as he may deem best calculated to bring such interest fully and fairly before the Court; and this order I direct to be fulfilled by the Colonial Government, the defendant in the cause. I do not overlook the position of the plaintiff, the hearing of whose suit is thus delayed from no fault of his. I had occasion in June to say what I thought was necessary in regard to certain hardships alleged by him from delays which were in no way attributable to the Court; but any delay which has now arisen and which may continue lies solely at the door of the defendant. I will, therefore, allow the plaintiff costs at the rate of one guinea per diem from the date of the letter or memorandum of the acting-head of the Native Department to the registrar to which I have referred until the order of the Court has been obeyed, with leave to move for a higher allowance should the resistance be prolonged.

Order made accordingly.

[On November 2nd the Attorney-General, on behalf of the Crown, moved on affidavit for a rule *nisi* to show cause why the above order of 25th October should not be set aside. The Court intimated that if pleadings were filed on behalf of the natives setting forth the substance of the affidavit the order of the Court would be sufficiently complied with. If to this was added a declaration that their interest in the land had ceased the Court would then be free to deal with the matters in dispute between the plaintiff and the Crown.

On November 13th the Attorney-General moved on various grounds for leave to appeal to Her Majesty in Privy Council against the interlocutory judgment of the Court delivered on 25th October, and the subsequent order issued on 2nd November. In the course of his

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remarks to the Attorney-General the Chief Justice stated that it was not his intention to have issued the order dated 2nd November, and no orders had been given to the registrar to issue it.

The application for leave to appeal was refused, and the order dated 2nd November cancelled as having been issued without authority; and as the resistance to the former order of the Court had been materially modified by the affidavit filed the order relative to costs was discharged from the date of filing the affidavit.].

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Jan. 22.

[CIVIL JURISDICTION.]

TURNER *v.* SHERRARD AND ANOTHER.

Liability of adjoining owners to fence lands—Fences (Dividing) Act, New South Wales (9 Geo. IV. No. 12)—Ordinance No. I. of 1875—Ordinance No. II. of 1875—Proclamation (adopting laws of New South Wales), 14th October, 1874—Supreme Court Ordinance 1875, ss. 26–28—Resolution of Council, 11th March, 1876.

On an action brought under the Fences (Dividing) Act of New South Wales (9 Geo. IV. No. 12), to compel an adjoining owner to pay half the cost of erecting a dividing fence,

Held, that even supposing the Fences (Dividing) Act of New South Wales to be in force in Fiji (which, in the opinion of the Court, it was not), its provisions could only apply to the case where the fencing was necessary for the convenience of both properties, which was not the case here.

This was a claim for 100*l.* 1*s.*, which amount the plaintiff, Mr. James B. Turner, of Rewa, sought to recover from the defendants, Messrs. Sherrard and Crowe, of Wainikavika, Rewa, for their half of the expense of erecting eighty-seven chains of a boundary fence between the respective properties of the plaintiff and defendants. There was no dispute as to the fence having been erected; but the entire question resolved itself into one of law—as to whether any obligation