JUDGMENTS

OF THE

SUPREME COURT OF FIJI.

[CIVIL JURISDICTION.]

[ACTION No. 2, 1908.]

1908
Nov. 21.

CALDWELL *v.* MONGSTON.

Recovery of possession of lands. Plaintiff registered proprietor under Real Property Ordinance 1876. Certificate of Title dated 21/8/1907—Validity of Certificate of Title. Adverse possession.

Held, not competent for the Court to go behind Certificate of Title unless obtained by fraud: or a title has been obtained by adverse possession.

C. MAJOR, C.J. In this action the plaintiff's claim is for recovery of possession of lands known as "Wainikavika" or "Solo," situated at Navua in this Colony, which throughout this judgment I shall call Solo.

The plaintiff is the registered proprietor of Solo, holding a Certificate of Title thereto dated the 21st August, 1907. The defendant is in possession of Solo and has refused to deliver up the same to the plaintiff.

Prior to the commencement of this action the plaintiff took out an orginating summons calling upon some ten persons, of whom the defendant was one, to show cause why they should not deliver up possession of Solo to the applicant. The summons was heard against Mongston only and was dismissed, the learned acting Chief Justice who heard it being of opinion that the issues involved were too important to permit of their being dealt with in Chambers.

Note.—The summons referred to was an originating summons issued under the Real Property Ordinance 1876, Part XV. The Court after reviewing the outstanding aspects of the matter dismissed the summons on the ground that such a procedure was not "a method by which complicated questions of fact and legal inferences can be satisfactorily dealt with."

1908

CALDWELL v. MONGSTON.

The plaintiff has resorted to the more usual remedy which is, notwithstanding the dismissal of a summons of the kind, expressly reserved to him by the Real Property Ordinance of 1876, and brought this action of ejectment. I only mention this intermediate step in the proceedings between the parties because at one stage of the hearing of this action, it was suggested that a plea of *res judicata* might be raised as to certain issues common to both the summons and the action. The learned Judge who heard the summons certainly did express some opinions on the facts before him, but he decided nothing. It would have been embarrassing to the plaintiff in the prosecution of the action he had a right to bring, if the judge had done so. The opinions themselves to which I have referred are carefully guarded in expression. The Judge says "it would seem that"; "I should be inclined to think that"; "it would seem doubtful that"; "it seems to me, however, possible that"; and kindred phrases. In two cases only can I find anything like departure from this caution. One, where the learned Judge says "Such being the facts that I have before me, I have come to the conclusion that Martha Warburton definitely abandoned her right to have a grant issued under the Lands Claims Ordinance 1879." The second, where he says "As against an innocent purchaser without notice the defendant may have contributed to defeat his own title, but the plaintiff is not an innocent purchaser without notice." When the learned Judge said at the close of his judgment—"I think it is open to the plaintiff to bring an action for the recovery of the land and that, in such an action, the rights can be properly determined," and when he dismissed the summons "but without prejudice to the plaintiff's right to establish his claim to the land by any other process than the summary one to which he has had recourse," it is obvious that whatever fell from the Judge in giving judgment was but an expression of opinion, and that only on the facts before him, and in no wise a decision on the points, or any of them, at issue between the parties.

The statement of claim bases the plaintiff's case upon his Certificate of Title to Solo, incidentally setting forth his purchase on the 6th August, 1907, of the property from Thomas Warburton and Minnie Arkins, administrator and administratrix, for the sum of £1,400, who on the same day executed a transfer of their title to the plaintiff.

To that statement of claim the defendant pleads possession and in the alternative that the plaintiff is not an innocent

purchaser of the lands without notice of the defendants' claim, but purchased the same well knowing—

(1) That his transferrors, the administrator and administratrix of Martha Warburton, who died on the 7th of July, 1896, were not, when they transferred to the plaintiff, seized or possessed of Solo and had no legal title thereto.

(2) That Martha Warburton in 1875, petitioned the Lands Commission, appointed at that time to investigate claims to lands arising out of transactions with natives before Fiji became a British Colony for an allowance of her claim to Solo and was, by notice in Fiji Gazette on the 23rd November, 1883, declared to be entitled thereto.

(3) That a caveat against the issue of a Crown Grant of Solo to M. Warburton having been, on the 14th January, 1884, lodged by C. L. Sahl, assignee of F. &. W. Hennings in liquidation, it was wrongfully removed in November, 1902, upon the application of the Commissioner of Lands of the Colony.

(4) That M. Warburton, having failed to enter into possession of the lands and having abandoned the same, the defendant, in November, 1890, purchased the right of possession thereof from one Copeland, has continued in uninterrupted possession thereof from that time until now, with no claim at any time to possession from Thomas Warburton and Minnie Arkins, and that the plaintiff's claim through them is barred by the statute of limitations, a Crown Grant, issued on the 5th June, 1903, to M. Warburton, which led to the issue of a Certificate of title to Warburton and Arkins and so to the transfer from them to the plaintiff, having been wrongfully issued.

(5) That from November, 1902, to September, 1907, the plaintiff was himself and as one of the firm of Garrick and Caldwell, the defendant's solicitor, instructed to secure for the defendant his title to Wainikavika by possession and that the defendant, on the advice of the plaintiff and his firm, took no steps to prevent the issue of a Certificate of Title to Warburton and Arkins.

The defendant further counterclaims (1) for £2,500 damages for loss of his right of possession of the lands by reason of the plaintiff's negligence and (2) alternatively for a declaration that the plaintiff, as the defendant's solicitor at the time that he (the plaintiff) purchased the lands, so purchased for and on behalf of the defendant, who is entitled to a transfer of the same from the plaintiff upon payment of the purchase money, less costs and expenses.

The history of Solo, so far as is contained in the evidence before me, is as follows:—

In February, 1867, the native owners of Solo sold the property to Messrs. Drew, Thompson and Missen. Drew was bought out by his co-owners in 1868, taking a mortgage over the property to secure the re-payment of his purchase money.

1908

CALDWELL v. MONGSTON.

In 1871 Drew sold his mortgage debt to Thomas Warburton (who may be described as Thomas Warburton the elder) for £450, and in the same year Thompson and Missen, presumably for further advances, mortgaged Solo and another block of land called Dulewalu to Warburton for £2,000. Between that time and 1874 Messrs. F. & W. Hennings appear as creditors of Thompson and Missen for advances for the upkeep of Solo and Dulewalu. Warburton died during this period and in August, 1874, Solo and Dulewalu were sold at public auction by James Fullarton, his administrator under the mortgagee's power of sale. The lands were purchased by one W. Fisher, who, in the same month sold them to Martha, relict of Thomas Warburton the elder.

After these islands were, in 1874, constituted a British Colony and in pursuance of the terms of the Deed of Cession whereby that came to pass, a Commission was appointed to investigate claims to land arising under any contract entered into before Cession and to report thereon to the Governor in Council. Many petitions were presented to the Commissioners by persons claiming interests in land of the Colony for investigation. With only two have I, for the purposes of this action, any concern. On the 6th of July, 1875, a petition, No. 70 on the record of the Commission, was presented by M. Warburton relative to Solo and Dulewalu. On the 13th August, 1875, a petition, No. 330 on the record of the Commission, was presented by Edwin Missen, by his attorney, C. Truscott, relative to the same lands. This Edwin Missen was the representative of the estate of Alfred Missen, the surviving partner of the firm of Thompson and Missen, the mortgagors to Warburton the elder.

The petitions were considered by Mr. A. P. Maudsley, a member of the Lands Commission, and a copy of his report has been admitted as evidence. After examination of the allegations of the petitioners, he reported thus:—

> The Commissioner therefore recommends that a block of land according to the boundaries marked on the plan be granted to E. Missen, one of the applicants, subject to the decision of the Governor in Council on the claim advanced by Martha Warburton and F. & W. Hennings.

The report is followed by three memoranda. The first—

> There is a Government claim against the estate for unpaid labour A.P.M.

The second—

> Mr. Truscott informs me Missen withdraws his claim before the Commissioner C.M.

I do not know who C.M. was. The third—

Allowed on the report. Issue of grant to await settlement of disputes to whom it is to issue. 22/6/'76. C.O.E.

These initials stand, I am informed by counsel, for Charles O. Eyre.

An unsatisfactory report enough, the indeterminate nature of which with its somewhat bewildering memoranda sowed the seed of the present trouble and expense to which the parties to this action and this Court have, thirty years after, been put.

Although in 1878, as appears by the Commissioner's report, the lands of Solo and Dulewalu had not been cultivated " for some years " and the buildings thereon were " falling into decay " the claimants thereto were well known. With that report, however, the claimants themselves, Missen and Warburton, vanish; Missen, perhaps, because his attorney Truscott thought his information to " C.M. " of withdrawal of Missen's claim absolved him from further appearance; Martha Warburton because the question of to whom the grant was to issue had yet to be decided.

In 1879, Ordinance No. XXV of that year, the Lands Claim Ordinance 1879, was passed. It has been exhaustively examined by counsel on both sides and I shall have occasion later to deal with various sections referred to bearing upon this matter. It suffices at this stage to say that the Ordinance was passed to " set at rest doubts as to the validity of existing titles." The state of things regarding Solo and Dulewalu at any rate certainly called for legislation for a sedative kind. The preambles set forth (1) that the Lands Commission had investigated and reported to the Governor in Council on many claims laid before it; (2) that the Governor had dealt with some of those claims and caused Crown Grants to be issued in respect thereof; (3) that other claims had not then yet been disposed of, and (4) that it was expedient to provide for the final settlement and adjustment of all claims.

For accounts of Solo between 1879 and 1890 I have to resort to some of the evidence given for the defendant. It is little enough, but, so far as it goes, is uncontroverted.

The report of Mr. Maudsley was bearing fruit. A crop of persons appear, none of whom appears to have been ever so remotely connected with those of whom, claiming to be owners, mortgagees or encumbrancees of Solo, we have already heard. Charles Agustus Huon is a witness whose memory runs furthest back. He came to Fiji in 1872 and lived at Navua in 1875–1877, in 1879 and 1880. During that residence the

1908

CALDWELL v. MONGSTON.

successive occupiers of Solo were, the witness states, George Burt and Thomas Copeland. "These lands," the witness adds, "have been notorious for different occupiers." Raymond Morel remembers the occupation of Solo by George Burt. Before Burt's occupancy, which occurred some two or three years after the witness went to Navua, the place was empty. He thinks Copeland bought Burt out.

James Dixon lived at Navua in 1879 and for many years thereafter. In 1879 there was no one living on Solo, so far as the witness knows. Burt was the first occupier, then Copeland lived there, and after Copeland there came the defendant. All these witnesses, residents on the spot, agree that Martha Warburton to their knowledge never came near the property. The defendant, it is amply proved, went into occupation of Solo in November, 1890. For the purposes of this judgment, I may take it that he has been there ever since.

A curious document, only coming to light between the close of the pleadings and the trial of this action, and upon which the defendant's case very largely depends, is next in order of date.

It is a grant from the Crown of Wainikavika or Solo to Martha Warburton her heirs and assigns, is dated the 20th day of July, 1881, is duly attested by the then Governor of the Colony, Sir William Des Voeux, and bears her late Majesty's Great Seal for Fiji. To it is attached a piece of paper bearing the following words and figures:—

NAVUA RIVER
Survey Fees
—Missen ?
Wainikavika or Solo
John Berry. 20/7/81.

Not to issue.
Caveats Reece and Hennings.

By section 10 of the Lands Claim Ordinance 1879 already referred to, the Governor in Council had, after determining the matter of a petition such as those of Missen and Warburton, to issue to the person interested a certificate of that decision, and cause its purport to be published by notice in the Gazette, the notice specifying every person to whom, in consequence of that decision, any Crown Grant would be issued. Not until the 23rd of November, 1883, more than two years after the date of the Crown Grant just mentioned and nearly six years after the report of the Lands Commissioner, Mr. Maudsley, had been made, did a notice appear in the Gazette, announcing that Martha Warburton's claim to Solo had, after consideration of the report thereon, been allowed by the Governor in Council. There is much obscurity

in all this, which neither party has attempted to dissipate. There is no evidence before me explaining the lapse of time between the legend " allowed on report. Grant to await settlement of disputes to whom it is to issue " and the notice of allowance in the Gazette. There is none—and this is particularly unfortunate—how the Governor came to witness a Crown Grant of Solo to Warburton in 1881, two years before the time when, according to the notice in the Gazette, any conclusion had been arrived at that a Grant was to issue at all.

The words " not to issue; caveats Reece and Hennings " which I have mentioned above as appearing on the piece of paper attached to the grant of 1881, must have been, though there is nothing to show it, written thereon after the date of John Berry's signature " 20/7/81 " for shortly after the notification of the allowance of Warburton's claim, that is to say, on the 14th and 28th January, 1884, those caveats were lodged. On behalf of C. L. Sahl, assignee of the estate of F. & W. Hennings and Edward Reece, a New Zealand merchant, respectively, they were against the issue of the grant to M. Warburton, the caveators claiming to be equitable mortgagees of Solo and Dulewalu by deposit of title deeds.

The defendant, as I have already noticed, being in possession of Solo, Martha Warburton died in 1896 and in December of that year Letters of Administration of her estates were granted in the State of Victoria to Thomas Warburton the younger and Ada Minnie Warburton. The Administratrix has since become Ada Minnie Arkins.

On the 23rd December, 1902, the following endorsement was made on the caveats of Reece and Hennings:—

> Notice to remove caveat registered 25th November, 1902, at 10 o'clock a.m. Caveats Book 25, Fol. 6 and 6a. The Commissioner of Lands requesting removal of this caveat, more than 21 days having elapsed and no Order of the Supreme Court having been received, this caveat is now removed this 23rd day of December, 1902.
>
> M. T. DODS.

On the 5th June, 1903, the late Sir Henry Jackson, then Governor of this Colony, witnessed a Crown Grant of Solo to Martha Warburton her heirs and assigns, and on the 26th of the same month, nearly ten years after the notice of allowance of her claim thereto, the following notification was made in the Gazette:—

> It is hereby notified that the undermentioned Crown Grants are now ready, for issue, and may be taken up by the

1908

CALDWELL v. MONGSTON.

person entitled thereto, on application at the office of the Commissioner of Lands.

Martha Warburton	Wainikavika or Solo	Navua.
Martha Warburton	Dulewalu	Do.

GEORGE MOORE,
Commissioner of Lands.

Warburton the younger and Arkins (formerly Warburton) appear to have come in under that notice for, on the 6th August, 1907, they, being then the registered proprietors of Solo, executed a transfer of their title to the plaintiff. The plaintiff then obtained the Certificate of Title in his favour upon which he bases his present claim.

And that is the history of Solo and the transactions regarding it from February, 1867, to the present time.

At the trial of the action it was agreed between counsel that the hearing should be in the first instance confined to the plaintiff's claim to recover the land and the defendant's defence (1) of possession simply; (2) that the plaintiff is not an innocent purchaser without notice; and (3) of adverse possession; the counterclaim of the defendant in respect of the plaintiff's alleged negligence and for a declaration of trust standing over, and on those lines the hearing proceeded.

Mr. Alexander's argument for the plaintiff may be thus summed up:—

(1) That the plaintiff is the registered holder of a Certificate of Title to Solo, having acquired the property by *bona fide* purchase and genuine transfer, and that to that Certificate of Title the provisions of the Real Property Ordinance 1876 apply.

(2) That, so far as it is necessary for him to refer to it, Martha Warburton, from whose representatives the plaintiff purchased Solo, had a Crown Grant thereof to her, and that to that Crown Grant the provisions of the Lands Claims Ordinance 1879 apply.

(3) That the law of 1879, prescribed the machinery to be employed, in the special circumstances which that law was passed to meet, in obtaining a Crown Grant under its provisions; that the law of 1879 was, and for the purposes of this action still is, to be read with the earlier law of '76, that is to say. that a Crown Grant issued in pursuance of the law of '79, thereupon becomes referred back and subject to the law of '76.

(4) That by the combined effect of both laws, the plaintiff's Certificate of Title is indefeasible and, except on the ground that he fraudulently obtained it, or that the defendant has,

since its issue, acquired a title to the land to which it relates by possession adverse to the plaintiff, cannot be challenged in this Court.

(5) That the plaintiff's Certificate of Title being by law declared to be conclusive evidence that he is the absolute and indefeasible owner of Solo, no inquiry can be had into facts antecedent to its issue unless those facts support a claim of fraud in obtaining it.

To that argument, and particularly to the fifth branch of it, apart from the defendant's defence of adverse possession and that the plaintiff is not an innocent purchaser without notice, Mr. Berkeley has advanced a variety of propositions which, although, and even if, sound and incontrovertible, depend for efficacy upon the question whether I can examine and pronounce upon the legality, or the propriety, or the regularity of transactions which preceded the issue of the plaintiff's Certificate of Title and which are not essential to the decision of the question (the sole question, as Mr. Alexander contends, open to the defendant to raise), has the defendant acquired a title against the plaintiff by adverse possession.

Some of these propositions are (1) that the Crown had no power to make a grant of Solo in 1881, that property being part of lands expressly excepted by the fourth clause of the Deed of Cession from the absolute proprietorship of her late Majesty, (2) that even if the Crown had the power, it could only make one grant of the same land, that that grant was made in 1881, and that, therefore, the grant of 1903 was void, (3) that the caveats of Reece and Hennings against the issue of a Crown Grant to Martha Warburton were improperly removed from the register, (4) that the sale of Solo by Warburton the younger and Arkins to the plaintiff in 1903 was against the provisions of the Pretence Titles Act, 32 Hen. VIII, c. 9, s. 2.

Before I pass to consideration of the argument for the plaintiff that his Certificate of title is conclusive evidence of his indefeasibility of title and cannot be challenged save for fraud in obtaining it, or on the ground of adverse possession, it will be convenient to refer to the provisions of the various Ordinances which govern the circumstances of this case, prefacing the reference by examination of the Deed of Cession whereby Fiji became a British possession, which I conceive to be necessary for a right understanding of the system of registration of title to land prevailing in the Colony.

Clauses one, four and seven of that Deed are those which call for notice, and they read as follows:—

1908

CALDWELL v. MONGSTON.

1. That the possession of, and full sovereignty and dominion over, the whole of the Group of Islands in the South Pacific Ocean, known as the Fijis (and lying between the parallels of latitude of fifteen degrees south, and twenty-two degrees south of the Equator, and between the meridians of longitude of one hundred and seventy-seven degrees west, and one hundred and seventy-five degrees east of the meridian of Greenwich), and over the inhabitants thereof, together with the possession of and sovereignty over the waters adjacent thereto, and of and over all ports, harbours, havens, roadsteads, rivers, estuaries, and other waters and all reefs and foreshores within or adjacent thereto, are hereby ceded to, and accepted on behalf of, Her said Majesty the Queen of Great Britain and Ireland, Her Heirs and Successors, to the intent that from this time forth the said islands, and the waters, reefs, and other places as aforesaid, lying within or adjacent thereto, may be annexed to, and be a Possession and Dependency of the British Crown.

4. That the absolute proprietorship of all lands, not shown to be now alienated, so as to have become *bona fide* the property of Europeans or other Foreigners, or not now in the actual use or occupation of some Chief or tribe, or not actually required for the probable future support and maintenance of some Chief or tribe, shall be and is hereby declared to be vested in Her Majesty, Her Heirs and Successors.

7. That on behalf of Her Majesty, His Excellency Sir Hercules George Robert Robinson promises (1) That the rights and interests of the said Tui Viti and other high Chiefs, the Ceding parties hereto, shall be recognised so far as is and shall be consistent with British sovereignty, and colonial form of government. (2) That all questions of financial liabilities and engagements shall be carefully scrutinised, and dealt with upon principles of justice and sound public policy. (3) That all claims to title to land, by whomsoever preferred, and all claims to pensions or allowances, whether on the part of the said Tui Viti and other high Chiefs or of persons now holding office under them or any of them, shall in due course be fully investigated and equitably adjusted.

Those three clauses mean that possession of, and full sovereignty and dominion over, all lands of the Colony were transferred to and vested in her late Majesty, subject to the establishment of claims by Europeans or other foreigners to those portions thereof which should be shown to have been *bona fide* alienated before Cession, and subject also to any rights to other portions thereof by reason of user and occupation, or by virtue of necessity for maintenance of some chiefs or tribes; from the absolute proprietorship of these portions of land the Crown would be excluded. Not enough attention has, in my opinion, been paid to the possession by the Crown of all the lands of the Colony, but the suspension of the absolute proprietorship of only a portion of the same.

Hence it is that, amongst the first enactments of the Colony's law, Ordinances Nos. 3 and 6 of 1875 appear. The former, after referring to a Lands Commission to be appointed in pursuance of the Crown's undertaking in clause seven of the Deed of Cession, prohibiting the commencement or maintenance of suits, actions, or proceedings involving any then existing claims to land, the latter forbidding, and rendering invalid if entered into, all conveyances, transfers, leases and transactions whatsoever relating to land or any interest therein between natives and non-natives.

It is quite obvious therefore that there could be no tenure of land or title thereto, at the outset of Fiji's history as a British Colony except from the Crown, whether by grant, or certificate of ownership, or instrument of confirmation, or how otherwise soever.

It is easy to understand, therefore, that the Real Property Ordinance 1876, the next step in legislation as to land, does not contemplate, makes no provision for, any other document of title to land in the first instance, than a Crown Grant, for the simple reason that there could be no other. The preamble recites the expediency of providing for registration of titles to land and of facilitating their transfer, and, after some purely preliminary matter, simply enacts in section nine, "Crown Grants of land in Fiji shall be grants in fee simple." These are to be in duplicate, the duplicates are to be delivered by the Commissioner of Lands to the Registrar of Titles, who is to register them and thereafter deliver one of them back to the Commissioner of Lands, who shall then issue it to the grantee.

Section 13 goes on to prescribe the issue of a Certificate of Title to the person to whom land contained in a Crown Grant should be first transferred to or on whom it should transmit or devolve, and also to every succeeding new proprietor, and enacts that "the title of the proprietor under each fresh Certificate of Title shall be as valid and effectual in every respect as if he had been the original grantee in the Crown Grant." Section 14 is an important section, I give it in extenso:—

> The duplicate certificate of title issued by the Registrar to any purchaser of land upon a genuine transfer or transmission by the registered proprietor thereof, 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

1908

CALDWELL v. MONGSTON.

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.

In connection with the view I have already expressed on the foundation of all title to land being derived from the Crown, it is worthy of observation that, whereas in many Acts and Ordinances relating to registration of title to land standing on the statute books of other colonies, for instance those of Australia and New Zealand, to which counsel have repeatedly referred me, there are to be found provisions for the creation of a land assurance fund from which persons damnified by the issue of a Certificate of Title can, in certain circumstances be compensated for that issue, in the Real Property Ordinance of this Colony there is none. The reason for the omission, to my mind, is obvious. Registration of title to land in Australia and New Zealand was an innovation upon what I may call the ordinary and more or less ancient system of conveyancing prevailing when the registration statutes came into operation. It is easy to understand that, in examination of title and issue of certificates thereof, mistakes might occur, misdescriptions of property might be given, errors by officials whose duty it was to conduct examinations of title and issue of certificates might be committed, whereby persons, perhaps through no fault of their own might find themselves prejudiced by the issue of a document declared, as it universally is, to be incapable of challenge except in a few specified instances. Here in Fiji there was no necessity for an assurance fund. All titles to land were to be granted by the Crown under legislative sanction and protection, and that after careful investigation of claims thereto, a grant having been made it was to be registered, and upon registration it was to be indefeasible and conclusive evidence of its contents.

That brings me to another important incident of the Real Property Ordinance—a title that is somewhat misleading as being too wide. It is to provide for the transfer of land by registration of titles; its preamble recites the expediency of providing for registration of titles to land and registration of the first document of title, a Crown Grant, and after it a Certificate of Title, is compulsory. Throughout the Ordinance, except where it is expressly dispensed with, everything depends for validity on registration. The same note is sounded in succeeding laws. In Ordinance No. XV of 1877 (old style), section 6:—

> The mortgage (a preferential mortgage in favour of manufacturers of machinery) shall be validly constituted a mort-

gage under the Real Property Ordinance 1876, as soon as the same is registered.

In Ordinance No. XVII (now No. IV) of the same year, section 10:—

> When lands are sold the Commissioner of Lands shall grant to the purchaser a certificate, and upon presentation of the said certificate to the Registrar of Titles, the Registrar shall register the purchaser.

In Ordinance No. 1 of 1878, section 10:—

> The Registrar of Titles shall, upon presentation to him of a certified copy of the said judgment (a judgment for amount of compensation for lands acquired by the Crown) register the Crown as proprietor.

I have already mentioned the Land Claims Ordinance 1879. I will now notice the provisions of that law to which so much reference has been made in the course of the argument. Section 2 runs as follows:—

> In this Ordinance the term "indefeasible" when applied to a Crown Grant or Certificate of Title means that such grant or Certificate of Title shall be taken by all Courts of law as conclusive evidence that the person named therein as grantee or proprietor is the absolute owner of the land therein described for the estate or interest therein mentioned, and that the title of such grantee or 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, subsequent to the date of such grant, for the prescriptive period.

Comparison to this section with section 14 of the Real Property Ordinance 1876 shows how almost identical they are; they differ, however, in that in the latter section the prescriptive period is to commence "subsequent to the date of the grant" while the former does not say when the prescriptive period is to commence.

The Ordinance goes to provide, in section 3, for presentation of all claims not already submitted within six months from the commencement of the Ordinance. Having considered the report of the Commissioners on a claim, the Governor in Council shall decide the claims and embody his decision in a certificate which he shall issue to the persons interested causing the same to be published by notice in the Gazette, that notice specifying the person to whom, in consequence of the decision, a Crown Grant is to issue. Section 18 provides that in issuing Crown Grants under the Ordinance, the same notices shall be given, the same formalities observed and the same fees paid as are for the time being prescribed by law in respect of the

1908

CALDWELL v. MONGSTON.

issuing of other Crown Grants. This is a reference to Ordinance No. XVII (now IV) of 1877 above mentioned. Section 19 enacts that all Crown Grants to be issued under the Ordinance shall be registered as prescribed by the Real Property Ordinance 1876, and, if so registered, shall, with the exceptions in the Ordinance mentioned (these are fraud or misrepresentation or adverse possession) be indefeasible from the date of issue as well as all certificates of title following thereupon in conformity with section 14 of the Real Property Ordinance 1876.

The Ordinance concludes with provisions whereby any mortgagee or encumbrancee, or other person claiming any estate or interest in the lands in respect of which notice has been given that a Crown Grant may be issued, may lodge with the Registrar of Titles a caveat against the issue of the intended grant. A caveat of the kind is to be dealt with in every respect in the same way as caveats under the Real Property Ordinance 1876.

Thus we see that, once the machinery of this Ordinance has been resorted to in order to get a title from the Crown and once it has done its work, the grantee is referred back to the Real Property Ordinance for procedure and for all the accompanying effects attending the registration of his title.

The above being the various provisions of the law governing the circumstances of this case, I have no hesitation in saying that I agree with the contention of counsel for the plaintiff, that it is not competent for this Court to examine facts antecedent to the issue of the plaintiff's Certificate of Title, or to pronounce upon their validity or invalidity for the purpose of impeaching the plaintiff's title, except those facts be so connected with the issue of the certificate as to support an allegation of fraud in obtaining it.

Holding the view already expressed of the meaning and effect, of the obvious object, of the Real Property Ordinance 1876, closely related as it admittedly is to the system of registration of titles to land adopted in other colonies which has received judicial examination and interpretation laying down, as remarked by the learned Judge in his judgment on the case of *Hamilton* v. *Iredale* (N.S.W. Rep. 1903, Vol. 111), that the object of Courts should be to support and strengthen, not weaken the indefeasibility of certificates of title—holding this view, I say, I come to this conclusion without the aid of decided cases. If I required authority I have it ready to hand in the case of the *Assets Co.* v. *Mere Roihi and others*, reported in L.R. App. Cas. 1905, at page 176. That case

not only clearly disposes of any doubt that might exist on the point I am considering, but it is, as regards the facts involved in its decision closely analogous to the present case. There, it was claimed that certain proceedings of a Native Land Court, the tribunal through which the transfer of the property of aborigines in New Zealand to Europeans was effected, had been irregular, and more, that the irregularities were of such a nature as to affect the jurisdiction of the Court and to render its proceedings and orders absolutely null and void. Here, it is contended that the Governor in Council, the tribunal corresponding to the Native Court of New Zealand, had no power to make a grant at all of Solo, either in 1881, or at any other time, that if it had the power, that power was exercised in 1881, and that the grant of 1903 is void.

There, acts of the District Registrar were claimed to have been wrong and to have thereby vitiated subsequent proceedings following therefrom. Here, it is contended that the Registrar of Titles wrongly removed the caveats of Reece and Hennings, thereby clearing the way for the issue of the grant of 1903.

In the Assets Co. case, notwithstanding the positive proof of many facts which might (it was unnecessary to decide the point) have enabled the persons who challenged the Company's certificate of title successfully to claim relief in an action of another kind or to obtain compensation, the Lords of the Privy Council refused to consider them as grounds for challenge. "The sections," says Lindley, L. J., in delivering their Lordships' judgment, "making registered certificates conclusive evidence of title are too clear to be got over." The learned Judge adds:—

> In dealing with actions between private individuals, their Lordships are unable to draw any distinction between the first registered owner and any other. A registered *bona fide* purchaser from a registered owner (and that is the case here) whose title might be impeached for fraud has a better title than his vendor, even if the title of the latter could be impeached by the Crown.

It follows therefore that the various defences to this action which attack the proceedings of former days, which question the powers of the Crown, which challenge the validity of the acts of the Registrar of Titles, or seek to dwell upon the omissions of Martha Warburton's representatives as vitiating their transactions with the plaintiff, cannot avail against the clear provision of the law that a certificate of title is conclusive evidence of the indefeasibility of the title of its holder.

1908

CALDWELL v. MONGSTON.

I owe it, however, to Mr. Berkeley, who so industriously, so ably and so exhaustively urged those defences upon the Court to say something about some of them.

The Crown not only had power to make a grant of Solo, but, by the provisions of the Land Claims Ordinance 1879, it could exercise it in that way only.

Regarding the document of 1881, so far as the evidence on this point in the case has been carried, it appears to have been signed prematurely and by mistake; it has been stated by one of the witnesses to have been probably signed in blank; it was never acted on and never issued, and it could not have any effect until it was issued; it lacked that essential requisite for efficacy prescribed by law, registration.

Much argument was addressed to the construction to be put upon the definition of "indefeasibility" in section 2 of the Land Claims Ordinance as attaching from the date of the grant distinguished from the date of the issue of the grant in section 19. Any difficulty of reconciliation of the two sections has been created by the unaccountable error in dating the first grant in 1881 and the lapse of time between the allowaance of the claim and the issue of the Crown Grant thereupon. The difficulty, however, is only imaginary. In ordinary circumstances the date of a grant would be the date of its issue, or so soon thereafter, as to cause no important difference. In any event, the later provision must prevail, and the grant of 1881 was never issued.

I think the caveats of Reece and Hennings were improperly removed at the instance of the Commissioner of Lands after the notice of 1883 that Martha Warburton's claim had been allowed. She or her representatives, after that notice, were the persons to whom the grant was intended to issue.

The Crown grant of 1903 was, in my opinion, wrongly made out in the name of Martha Warburton, for at that date she no longer lived. Her representatives must have applied for the grant and to them it should have gone.

The provisions of the Pretence Titles Act, 32 Hen. VIII c. 9, have been, since the passing of 8 and 9 Vict., c. 106, s. 6 which is in force in Fiji, of no force. The case of *Jones* v. *Jenkins*, reported in L.R. 9, Q.B.D., at page 128, and the case of *Kennedy* v. *Lyell*, reported in L.R. 15, Q.B D., at page 491, decided that. In the former case, the defendant pleaded the statute of Henry in an action for damages for breach of covenants for title and quiet enjoyment. The head note is as follows:—

Although 32 Hen. VIII, c. 8, s. 2, cannot be said to have been repealed by 8 & 9 Vict., c. 106, s. 6, nevertheless since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, and on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands.

It will be seen when I come to consider the question of adverse possession that I hold that Warburton and Arkins when they transferred to the plaintiff had in fact an existing title to the land transferred. In *Kennedy* v. *Lyell*, the action was for forfeiture against the buyer of a right of entry; the penalties of the statute were invoked and it was held that in such an action as that, since 8 and 9 Vict. c. 106, s. 2, the onus is upon the plaintiff (in this case upon the defendant) to prove, not only that the title purchased was bad, but also that the buyer knew that it was "pretenced," i.e., fictitious or bad in fact. It is quite clear in this case that the plaintiff knew nothing of the kind. It was also held that the mere fact that the right purchased was barred by the statute of limitations at the time of the purchase does not necessarily render the title "pretenced" within the meaning of the 32 Hen. 8, c. 9.

There remain two contentions for the defendant requiring examination. The conclusiveness of the plaintiff's certificate of title is subject to two exceptions. One, it was obtained by fraud, the other, if the defendant can show that he has acquired a title against the plaintiff by adverse possession.

There is no fraud here, but it has been contended for the defendant that the plaintiff was not an innocent purchaser for value he well knowing what has been called the defendant's outstanding interest acquired by statute at the time that he purchased Solo. The contention could not be successfully maintained in that form even if the plaintiff had that knowledge for it would have to be classed as fraud on the plaintiff's part. But it would not have been that fraud which the Lords of the Privy Council laid down is necessary to be established before a man's Certificate of Title can be done away. In the Assets Co. case Lord Lindley said:—

Fraud in these Acts (the Acts of New Zealand—and the same principle applies to the Ordinance of Fiji relating to registration of title) means actual fraud, i.e., dishonesty of some sort not what is called constructive or equitable fraud, —an unfortunate expression and one very apt to mislead, but often used (and it is precisely the expression used by counsel for the defendant here) for want of a better term, to

1908

CALDWELL v. MONGSTON.

denote transactions, having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Acts (in this case the Land Claims Ordinance 1879), must be brought home to the person whose registered title is impeached or to his agents.

The learned Lord Justice goes on to speak of fraud in others from whom the registered owner derives title, but no fraud is alleged against Warburton and Arkins.

But the plaintiff could not know the defendant's outstanding interest acquired by statute for none outstood. The defendant must contend, and Mr. Berkeley does contend, that "adverse possession for the prescriptive period" means possession before the issue of the Certificate of Title. But the Ordinance of 1879, under which the grant of 1903 was made, expressly provides—and I take the more favourable expression for the defendant—that the prescriptive period must be subsequent to the date of the grant. I have already said that I cannot inquire into the validity of the 1903 grant, so from its date in any event would the time have to be reckoned. But I am asked to go back to the grant of 1881. Even if I could, that grant was not issued; possession must be adverse to some person and that person must have a complete interest against which the statute of limitations will run. But M. Warburton never had a complete interest because the grant of 1881 was not issued. There was no complete interest until 1903 and that date is too recent.

And so the defendant fails in his defence.

In concluding the judgment on this part of the case I desire to express my indebtedness to learned counsel on both sides for their learned and exhaustive arguments and for the assistance I have derived from the industry and ability with which those arguments have been presented.

I give judgment for the plaintiff on his statement of claim with costs.

3rd December, 1908.

Mr. Crompton for the defendant intimating that he cannot proceed with the counterclaims in the action, I give judgment for the plaintiff upon the defendant's counterclaim with costs.

CHARLES MAJOR, C.J.

(*Note.*—This decision was followed, so far as it related to adverse possession in the case of Hedstrom *v.* Brown, No. 14/1914.)