[**EDITORIAL NOTE.**—There has to date been no substantial amendment to the Registration Ordinance, 1879 (now Cap. 36) and the relevant sections are in the same words as at the date of this judgment.] Action for moneys due under agreement for sale and purchase or alternatively damages for breach of contract.

J. H. Garrick for the plaintiff.

H. Shaw and *H. M. Scott* for the defendant.

H. Shaw for the defendant : An agreement cannot be made a deed by any act of the Registrar of Deeds. The Ordinance only dispenses with the formalities of sealing and delivery of a document already a deed ; it is a condition precedent to the operation of s. 9[1] of the Ordinance that the document to be registered should first be a deed.

MAJOR, C.J.—This action raises a very simple issue. The statement of claim is practically admitted, but the defendant contends that the claim is barred by the Statute of Limitations. The cause of action arose on the 10th January, 1898, and the writ was issued on the 13th January, 1904. In answer to the defence of the Statute, plaintiff contends that the agreement sued on has become a deed by virtue of s. IX of Ordinance XI of 1879. Plaintiff further contends that defendant agreed to waive the question of the Statute. With reference to the first point, the plaintiff cannot succeed ; as I agree with the contention of defendant's counsel that a condition precedent to the operation of the section of the Ordinance is that the document should be a deed, which the agreement was not. If I needed any confirmation of this view, I find it in s. VII[2] of the Ordinance, which provides for the registration of agreements. As to the second contention, plaintiff points out no one of the three cases that would annul the operation of the Statute, but relies upon a waiver of its operation by the conduct of the parties. This conduct has to be gathered from the correspondence. I can find nothing that either implies or expresses any agreement to waive the Statute. The contention of waiver must also fail.

CALDWELL *v.* MONGSTON AND OTHERS.

[Civil Jurisdiction (Ehrhardt, Acting C.J.) Dec. 24, 1907.]

Real Property Ordinance 1876[3]—*Certificate of title issued following on a Crown Grant—claim for possession by registered proprietor—defence founded on adverse possession—whether a proper case for originating summons.*

Caldwell was registered proprietor of land at Navua under a Certificate of Title issued on 21st August, 1907, following on a Crown Grant issued in June, 1903. Defendant had been in possession of this land for over 17 years. Caldwell contended that since the Crown Grant was issued under the Land Claims Ordinance, 1879, his title was by virtue of s. 19 of that Ordinance indefeasible except as against a person in adverse possession for the prescriptive period since the issue of the

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[1] *Now Cap.* 36, *s.* 10.
[2] *Now Cap.* 36, *s.* 8.
[3] *Rep. See now Part* XXII *of the Land (Transfer and Registration) Ordinance, Cap.* 120, *Revised Edition, Vol.* II, *p.* 1267.

Crown Grant. The defendant's contention was that the Crown Grant was not in pursuance of the Land Claims Ordinance but was rather contrary to it since it was issued without the defendant's claim being considered, a caveat by the defendant's predecessor in title having been improperly removed.

HELD.—The procedure by originating summons provided by Part XV of the Real Property Ordinance, 1876,[1] is not a method by which complicated questions can be satisfactorily dealt with.

[**EDITORIAL NOTE.**—The questions raised in this case were disposed of in a subsequent action between the same parties—

Caldwell v. Mongston [1908] 1 Fiji L.R.]

The Acting Attorney-General, *G. G. Alexander* for the plaintiff.

R. Crompton for the defendant.

EHRHARDT, Acting C.J.—This is a summons taken out by the plaintiff under Part XV of the Real Property Ordinance 1876[1] for the possession of certain lands at Navua known as Wainakavika or Solo. The summons was originally directed against ten defendants, but all of them except Oliver Mongston have either consented to an order or been struck out on the application of the plaintiff. In this judgment it is only the respective rights of the plaintiff and Oliver Mongston that are in question.

The plaintiff bases his claim on the fact that he is the holder of a Certificate of Title following on a Crown Grant which was issued in respect of the land in question in July 1903. The defendant bases his claim on the fact that he has been in continuous adverse possession of the land before and since the grant for more than the prescriptive period. It is not denied that the defendant has been in possession for more than seventeen years. If this is a case of an ordinary Crown Grant the rights of the parties would seem to be determined by s. 14 of the Real Property Ordinance 1876, which is as follows :—

> " 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 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."

The defendant having been in adverse possession for more than the prescriptive period would be able to defeat the title of the plaintiff if this section applies. But the plaintiff contends that the Crown Grant issued in this case is not an ordinary one but was issued in pursuance of Ordinance No. 25 of 1879—" The Land Claims Ordinance." By s. 19 of that Ordinance 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 be indefeasible from the date of issue. By s. 2 indefeasible is defined. It means conclusive except on the ground of fraud or misrepresentation or " on the ground of adverse possession in another, subsequent to the date of such grant, for the prescriptive period." The plaintiff contends that as the grant in this case was dated and issued on the 5th June, 1903, it is according to the plain meaning of the sections only adverse possession since that date that can count towards the prescriptive period. The defendant has only been

[1] *Rep. See now Part* XXII *of the Land (Transfer and Registration) Ordinance, Cap.* 120, *Revised Edition, Vol.* II, *p.* 1267.

in possession for three and half years since that date and therefore, if the plaintiff's contention is right, cannot defeat the plaintiff's title. The question therefore arises whether the Crown Grant of the 5th of June 1903, was a grant issued under Ordinance 15 of 1879. That Ordinance was passed to lay down the procedure to be followed where claims to land based on transactions that took place before Cession had been investigated by the Lands Commission appointed to consider them. It prescribed that the Governor-in-Council should consider the reports of the Lands Commission and come to a decision on the claims made. A notice of any decision was to be published in the Gazette and a Crown Grant was issuable to any one whose claim had been allowed. Provisions for re-hearing in case any person was aggrieved by any decision were enacted, but need not be considered here. Provision was also made by which any person having a claim against any land might, within two months of the publication of the notice, lodge with the Registrar of Titles a caveat prohibiting the issue of the intended grant. It is clear from the context of the Ordinance that its object was to provide a method by which all disputes and claims existing in respect of a piece of land at the time the Lands Commission was investigating the matter could be speedily and finally settled before a grant was issued. It is absolutely silent about claims arising after the Lands Commission had reported and the Governor-in-Council had come to a decision. Such claims do not come within the clearly defined scope and purview of the Ordinance. To use the Ordinance to defeat bona fide claims which were not in existence when the right to a grant was being decided by the Governor-in-Council and which could not have been investigated by the tribunal provided by the Ordinance or safeguarded by the precautions taken in the Ordinance to prevent injustice would seem to be a use of it which was not contemplated by the Legislature. If it can be used to defeat involuntary claims such as adverse possession, it can, I should be inclined to think, equally be used to defeat voluntary charges such as mortgages or those due to agreement. It would appear that on June 22nd, 1878, the Lands Commission made a recommendation as to the land question. In November 1883 the Report of the Land Commission was considered by the Governor-in-Council and a notice appeared in the *Gazette* to the effect that M. Warburton's claim to the land had been allowed. Within the prescribed period of two months after the appearance of the notice, a caveat was entered against the issue of the grant on behalf of persons who claimed a charge upon the property for a sum of over £800. The property was also liable for sums due to the Survey and Immigration Departments amounting to £160. Martha Warburton whose claim had been allowed made no attempt to obtain the Crown Grant. She died in the year 1896. Such evidence as is before me is consistent with the conclusion that she had definitely abandoned the property as being unprofitable. If she did, the question arises whether interests adverse to her could not be acquired by other persons. It would seem at least doubtful whether, having by her acts shown that she gave up all claims to the land and thereby induced other persons to occupy and develop it, she could after an indefinite number of years change her mind and defeat the rights which had accrued. Had the Grant been issued when it was issuable that is to say within a reasonable time from November 23rd, 1883, adverse holders could undoubtedly have obtained a title against her. Can she put them in a

worse position by neglecting to take up the Grant and leading them to believe that she had abandoned the property ? Martha Warburton died in 1896 and Letters of Administration of her estate were issued in that year in Melbourne. Her administrators so far as is shown to me made no attempt to get the Grant. The caveat remained against the issue of the Grant until 1902. A caveat remains in force until there has been either a decision of the Supreme Court, or an agreement between the Caveator and the Caveatee or until the Caveatee applies to the Registrar for the removal of the caveat, and on notice of such application the Caveator does nothing for three weeks. It would therefore seem that unless the Caveatee, who in this case was Martha Warburton, applied for the removal of the caveat no grant could issue under the Ordinance. In November, 1902, however, the Commissioner of Lands applied for the removal of the caveat. There is nothing to show why he took this step, or on what grounds he considered he was the Caveatee. It would seem doubtful whether the application should have been attended to, or was binding upon anyone. It would appear however that the Registrar sent notice of the application to the address of the Caveators, namely, J. H. Garrick, Solicitor, Levuka, and after three weeks he removed the caveat. About six months afterwards a Crown Grant would seem to have been prepared which was signed on the 5th June, 1903. On the 25th June a notice appeared in the *Gazette* that the Crown Grant was ready for issue. So far as the evidence before me goes, none of the steps taken was due to any suggestion on the part of Martha Warburton or her representatives. From the Grant it appears that the claims by the Immigration and Survey Departments as to the land have been satisfied. There is no evidence before me as to who paid these claims, nor is there any evidence before me to show what became of the duplicate Grant on its being returned to the Commissioner of Lands. Three years subsequent to the issue of the grant, that is, in 1906, twenty-three years after the allowance of the claim by the Executive Council, and ten years after they became Administrators, the Administrators of Martha Warburton appear upon the scene and apply to be registered as the proprietors. They were so registered, and sold the property to the plaintiff in August of this year. 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. I need not come to any conclusion as to whether if she had changed her mind and applied for a Grant after rights had vested against her she would have been able to defeat the rights. This Grant was not issued on the motion of the Grantee, M. Warburton, who had been dead seven years at the time of issue. How it came to be issued—whose initiative, and why—is not clear on the evidence. But the question arises whether a Grant can be considered as issued under the Ordinance, 1879, if it is issued without the consent of and in spite of the abandonment of the right to it by the Grantee ? The caveat would seem to have been improperly removed. If it had remained the Grant could not have been issued under the circumstances. The question arises whether a Grant issued contrary to the provisions of the Ordinance can be regarded as issued in pursuance of it. It is not necessary for me to come to any definite decisions on these points. The parties have not supplied me with sufficient data. Towards the end of the year, 1902, before the removal of the caveat and

the subsequent transactions, the defendant in this case consulted the plaintiff as his solicitor with respect to this land and so far as the affidavits show, the plaintiff or his firm have advised him how to act and continued as the persons whom he regarded as safeguarding his interests up to the time of the issue of this summons. On their advice he took no steps at all to secure his position except to make a representation to the Colonial Secretary. It has been suggested that this factor has been imported into the case merely as a matter of prejudice. It seems to me however possible that it may have an important bearing in determining the rights of the present plaintiff and defendant. 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, and the mutual rights may be very different from what they would be but for the relation of the parties to each other. The plaintiff has had recourse to part 15 of the Real Property Ordinance. This provides a summary and expeditious method of obtaining possession and is applicable in most ordinary cases. It is not however a method by which complicated questions of fact and legal inferences can be satisfactorily dealt with. The evidence before me in the affidavits is too meagre to enable me to feel justified in definitely deciding on this originating summons the important issues between the parties. It is expressly provided by s. 106[1] that if the defendant proves to the satisfaction of the Judge a right to the possession of the land, the Judge may dismiss the summons, provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled. 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.

I therefore dismiss the summons with costs, 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.

CALDWELL *v.* MONGSTON.

[Civil Jurisdiction (Major, C.J.) December 3, 1908.]

Certificate of Title under Real Property Ordinance 1876—*right of Crown to issue original Crown Grant questioned—Validity of Certificate of Title—claims of adverse possession—when time starts to run against registered proprietor—Claim of fraud by registered proprietor—meaning of "fraud"—Pretence to Titles Act—whether in force in Fiji.*

One Martha Warburton had been a claimant in a petition to the Lands Commission in 1875 to land called "Solo" at Navua. By notice in the *Gazette* in 1883 she was declared to be entitled thereto but she did not in fact enter into possession. In 1884 a caveat against the issue of a Crown Grant to her was lodged by two persons claiming to be

[1] *Cap.* 120, *s.* 190, *Revised Edition, Vol* II. p. 1267.