

LEE BOW YIU

Appellant

AND

PATEL AND ANOTHER

Respondents

[COURT OF APPEAL AT SUVA (Sir Ragnar Hyne, President, Brownlees and Marsack, JJ/A) June 25th, 1957]

CIVIL APPEAL NO. 7 OF 1956

Real Property Limitation Acts (Imperial) of 1833 and 1874—Land (Transfer and Registration) Ordinance (Cap. 120)—construction of section 10—whether issue of certificate of title revives title lost to adverse possessor.

The appellant's predecessors in title erected, in September, 1916, a building partly on their own land and partly on land held in fee simple by the predecessor in title of the respondents. The land covered by such encroachment was the land in dispute in these proceedings. The appellant and her predecessors in title were continuously and without interruption in possession of the land in dispute from 1916 until the present time. The first claim by the respondents' predecessors in title to the land in dispute after the commencement, in 1916, of the appellant's adverse possession, was made on the 18th November, 1950. This claim was opposed by the appellant. On 19th September, 1951, formal notice was sent to the appellant that the land in dispute had, with other lands, been sold to the present respondents, and the appellant was called upon to remove that portion of her buildings which encroached upon the land in dispute. This she refused to do. A new certificate of title, No. 7818, was issued on 14th August, 1951, by the Registrar of Titles in favour of the respondents, upon the transfer. Included in this certificate of title was the land in dispute. The respondents commenced an action in the Supreme Court against the appellant, on 26th November, 1951. They claimed a declaration that the appellant was not entitled to occupy the land in dispute, and an injunction requiring her to remove so much of her buildings as stood thereon. The appellant filed a counterclaim asking for a declaration that the title of the respondents had been extinguished, and that the appellant was entitled to a vesting order, vesting the land in herself. Judgment was entered by the trial judge in favour of the respondents for the declaration and injunction sought. The appellant's counterclaim was dismissed. Against this judgment the appellant appealed.

The issue before the Court of Appeal was whether the trial judge was right in holding that by the issue of the new certificate of title in 1951 the respondents acquired a good title to the land in dispute notwithstanding the adverse possession of the appellant and her predecessors in title since 1916.

*Held* :—

- (1) Under the Real Property Limitation Acts (Imperial) of 1833 and 1874, which are in force in Fiji, the appellant's predecessor in title acquired, in September 1928, an absolute title to the land in dispute by 12 years uninterrupted and unchallenged adverse possession, and the respondents' title was for ever extinguished. This was so regardless of the provisions of the Land (Transfer and Registration) Ordinance (Cap. 120), sections 14 and 10 in particular.

- (2) There was nothing in section 10 of the Land (Transfer and Registration) Ordinance, Cap. 120, which established that the issue of a new certificate of title to a transfer from the registered proprietor revived a right, title, or interest in land which the registered proprietor had lost, and rendered invalid a title which the adverse possessor had already acquired under the Statutes of Limitation in force in Fiji.
- (3) The appellant had therefore acquired a good title to the land in dispute and no action could be maintained by the respondents to eject her therefrom.

Appeal allowed. Judgment entered for the appellant.

Cases referred to:

*Perry v. Clissold* (1907) A.C. 73.

*Cronin v. Vishnu Deo* 3 Fiji L.R. 405 overruled.

*D. M. N. McFarlane and K. C. Gajadhar* for appellant.

*J. N. Falvey* for respondents.

Judgment:

This is an important case, and involves difficult questions of interpretation of statutes and Ordinances concerned with land tenure in Fiji.

There is no dispute as to the facts, which are set out in a memorandum signed by counsel. Appellant's predecessors in title in September 1916 erected a building partly on their own land and partly on land held in fee simple by the predecessor in title of the respondents. The land covered by such encroachment is hereinafter referred to as "the land in dispute". Appellant and her predecessors in title have continuously and without interruption been in possession of the land in dispute from 1916 until the present time. The first claim by the respondents' predecessors in title to the land in dispute after the commencement of appellant's adverse possession in 1916 was made on the 18th November, 1950, and this claim was opposed by appellant. On 19th September, 1951, formal notice was sent to appellant that the land in dispute had, with other lands, been sold to the present respondents and appellant was called upon to remove that portion of her buildings which encroached on the land in dispute. This she refused to do. A new Certificate of Title No. 7818 was issued on 14th August, 1951, by the Registrar of Titles, in favour of respondents, upon the transfer, and included in that certificate of title was the land in dispute. On 26th November, 1951, respondents commenced an action against appellant claiming a declaration that appellant was not entitled to occupy the land, and an injunction requiring her to remove so much of her buildings as stood thereon. Appellant filed a counterclaim asking for a declaration that the title of the plaintiffs had been extinguished, and that appellant was entitled to a vesting order, vesting the land in herself. In the Supreme Court judgment was given in favour of respondents for the declaration and injunction sought, and dismissing the counterclaim. It is from that judgment that the present appeal is brought. At the hearing of the appeal counsel for appellant conceded that he could not obtain the declaration as to vesting order asked for in the counterclaim because the formalities required in an application for such an order had not been carried out.

The question for determination by this court is whether the judgment appealed from is right in holding that by the issue of Certificate of Title No. 7818 in 1951 respondents acquired a good title to the land in dispute notwithstanding the adverse possession of appellant and her predecessors in

title since 1916. This involves a consideration of certain statutes and Ordinances in which the land laws of Fiji are to be found, and in particular the Real Property Limitation Acts (Imperial) of 1833 and 1874, and the Land (Transfer and Registration) Ordinance, Cap. 120.

The Real Property Limitation Acts (Imperial) of 1833 and 1874 are in force in Fiji, but they must be read in the light of sections 35 and 37 of the Fiji Supreme Court Ordinance, Cap. 2, which provide that all Imperial Acts which are in force in Fiji are to be read subject to any existing or future Ordinance of the Colonial Legislature. Under the Real Property Limitation Acts as in force in Fiji adverse possession for an uninterrupted period of 12 years prevents the registered proprietor of the land from making an entry or distress, or bringing an action or suit to recover any land, against the person in adverse possession. In this present case, 12 years uninterrupted and unchallenged adverse possession had been completed by appellant's predecessors in title in September 1928. Leaving out of consideration for the moment the provisions of sections 10 and 14 of the Fiji Land (Transfer and Registration) Ordinance, Cap. 120, the rights acquired by the person in adverse possession seem to be clearly established. Adopting the words of Lord McNaghten in *Perry v. Clissold* (1907) A.C. 73 at p. 79:

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."

At the expiration of the 12 years' period therefore not only has the registered proprietor lost his right to bring an action for ejectment against the person in adverse possession, but the title of the registered proprietor to the land is absolutely extinguished. He no longer owns any interest whatever in the land and no action of his—whether by way of subsequent entry on to the land, by way of transfer to a third party, or in any other manner whatsoever—can revive the right title and interest which he formerly held and which he has now lost. He cannot dispose of the land by way of sale because he does not own it. And whereas during this statutory period of 12 years the person in adverse possession had a good title to the land as against everyone except the registered proprietor, as soon as the period of 12 years elapsed the title of the person in adverse possession became good against all the world.

Applying these principles to the present case, the title of respondents to the land in dispute was, in September 1928, for ever extinguished; and appellant (or her predecessor in title) acquired an absolute title. Until she obtained a vesting order under section 83 of the Fiji Ordinance, which it is conceded by counsel for respondents she could have obtained at any time between 1928 and the date of issue of Certificate of Title No. 7818, her title would not be evidenced by a document over the signature of the Registrar of Titles; but it was nonetheless an absolute and indefeasible title recognized by law.

It is clear therefore that respondents' claim to the land cannot succeed unless the effect of the Real Property Limitation Acts is modified by any local Ordinance to the extent that in certain named instances the provisions of the Limitation Acts do not apply. The only Ordinance which falls to be considered by the Court in this connexion is the Land (Transfer and Registration)

Ordinance, Cap. 120. The contention of respondents, upheld in the court below, is that section 10 of this Ordinance is conclusive in their favour. Section 14 is also material and is relied on by appellant in support of her case. Both these sections are contained in Part III of the Ordinance which is headed "Crown Grants, Certificates of Title and Registration". These sections read as follows:—

"10. When a grant is cancelled upon registration of a transfer or other dealing as hereinafter provided, the Registrar shall issue in duplicate a certificate of title in favour of the new proprietor in the Form A contained in the First Schedule hereto, one duplicate of which he shall register in the same manner as provided for Crown Grants and the other he shall deliver to the new proprietor; and in like manner upon the cancellation of each certificate of title a fresh certificate of title shall be issued, and the title of the proprietor under each fresh certificate shall be as valid and effectual in every respect as if he had been the original grantee of the land contained in the certificate.

14. 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."

Although these sections are not consecutive in Cap. 120 it is significant that in the original Ordinance establishing a form of the Torrens system in Fiji, the Real Property Ordinance of 1876 (the sub-title of which is "An Ordinance to provide for the transfer of Land by Registration of Titles") the corresponding sections were Nos. 13 and 14 and were obviously intended to be read together.

Part III of Cap. 120 largely deals with matters of administration of the system of land registration, the steps to be taken by the Registrar on registration, of dealings with land, and the effect of registration. It deals largely, though not entirely, with matters of procedure. There is nothing in that part of the Ordinance specifically stating that the Statutes of Limitation in force in Fiji are in any way modified or abrogated thereby; and counsel did not indicate the existence of any such express modifications in any other part of the Ordinance.

Under section 14 of the Ordinance express provision is made for the challenging of the title of a registered proprietor 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. In other words, there is no peculiar magic in a certificate of title which protects the registered proprietor against all onslaughts of hostile interests. If fraud or misrepresentation on the part of the registered proprietor is proved, or the appropriate period of adverse possession as specified in the Real Property Limitation Act is shown to have elapsed, the courts are not bound to accept the certificate of title as evidence of absolute and indefeasible ownership.

The learned trial judge held that section 14 impliedly modified the Statutes of Limitation in providing that the title of the registered proprietor can merely be challenged on the ground of adverse possession. The learned judge in effect says: This section is an acknowledgment that the registered

proprietor still has a title; whereas if the Statutes of Limitation applied his title would already have been extinguished. In our opinion this reasoning is the result of confusion arising from the various meanings given to the word "title". The registered proprietor has a document of title, shortly referred to as a title, which states that he is the owner of the land. Such a right as might arise from his possession of an "instrument of title" might also be referred to as his "title". It is that which section 14 says may be challenged. The title to the land in the sense of the right, estate and interest enabling a person to hold the land against all the world is the title which the registered proprietor has lost under the Statute of Limitations and which the adverse possessor has acquired.

We are of the opinion therefore that the trial judge was in error in holding that section 34 of the 1833 Act had been by implication modified by section 14 of Cap. 120.

The principal argument on the appeal was directed to the meaning of section 10 of Cap. 120, and it was largely on the wording of this section that the trial judge based his judgment, in the course of which he says:—

"I am of the opinion that unless and until a person in adverse possession of land for the prescriptive period applies for and is granted a vesting order under the Land (Transfer and Registration) Ordinance, Cap. 120, section 83 he has no title at all let alone one which is good against the title of the registered proprietor. Furthermore I hold that unless and until such a vesting order has already been made, where a fresh certificate of title is issued under the provisions of section 10 it gives the new registered proprietor a title as good as the original Crown Grant of the land gave the original grantee. I do not accept the contention made by learned counsel for the defendant that after a person has held adverse possession for the prescriptive period, the title of the registered proprietor is extinguished by the provisions of section 34 of the Real Property Limitation Act 1833, in view of the wording of section 14 of Cap. 120 which is inconsistent with those provisions."

He further states that in his opinion the judgment of Seton C.J. in *Cronin v. Vishnu Deo* 3 Fiji L.R. 405 was correct. Seton C.J. held that the effect of a transfer to a third party was, by reason of section 10, to destroy the title by adverse possession which the plaintiff had acquired but had failed to register.

There is, however, not one word in the Real Property Limitation Act or the Ordinance Cap. 120 to say that a title acquired by adverse possession is ineffectual against the registered proprietor until perfected by the issue of a vesting order. Before an adverse possessor who has acquired such a title is able to transfer his title to a third party it would no doubt be desirable, and from the point of view of the transferee perhaps necessary, that he should have official written evidence of his title; and for that purpose he may apply for a vesting order under section 83. That section is permissive and not mandatory.

The proper construction of section 10 presents some difficulty. The interpretation put upon it by both Seton C.J. in *Cronin's* case and Hammett J. in this present action, which forms the basis of their respective judgments, is that the issue of a new certificate of title by the Registrar confers on the registered proprietor a good title which is virtually unassailable on any ground whatever. In their judgment the administrative act of the Registrar in issuing a new certificate of title expunges from the title all defects, encumbrances and blots which may have fallen upon it since the time of the

original Crown Grant. If such a title is then freed by the act of the Registrar from the defect due to the adverse possession of a third party, it is also freed from mortgages and other encumbrances which have been placed upon it since the days of the original grantee. Counsel for respondents submits that mortgagees are protected in such a case by the provisions of section 35 of the Ordinance, Cap. 120; but this section does nothing further than imply a personal covenant by the transferee to comply with the mortgagor's obligations under the mortgage, a covenant which in the ordinary course of conveyancing practice is normally obtained by deed from the transferee upon a transfer of land subject to a mortgage. There is nothing in section 35 or in section 10 to provide that such new certificate of title upon a dealing in land shall show upon its face that the title of the new registered proprietor is subject to any encumbrances which did not affect the title of the original grantee.

The construction of section 10 adopted by Seton C.J. and Hammett J. leads to some results which it is difficult to imagine were intended by the Legislature. It means that the administrative act of the Registrar in issuing the new certificate of title can revive a right title and interest in the land which under the Statutes of Limitation has been irrevocably lost. It means that though the registered proprietor has no longer any interest in the land—which has been lost by the operation of the Statutes of Limitation—he can dispose of the interest he no longer owns as though he were in fact the owner, and can give his purchaser a valid title. It means that though the registered proprietor can take no action for ejectment against the person in adverse possession, he can in fact obtain the full value of the land by selling to a third person. Before the signing of the transfer and the issue of a new certificate of title, no person in the world has the right to eject the adverse possessor; immediately a new certificate of title is issued the new registered proprietor can eject him, under this interpretation of the section, by virtue of a right he has acquired solely through the person who had already lost all his title and interest to the land.

It is to be noted that though section 10 is on the face of it mandatory and lays down that the Registrar must on every dealing issue a new certificate of title, power is nonetheless given to him by section 33, when the whole of the land in a certificate of title is transferred, to record the transfer by way of memorial on the existing certificate instead of cancelling it and issuing a new one. It was agreed by Counsel that the latter method is in fact the normal procedure, and that a new certificate was issued in this instance only because there was no room on the old one for further memorials. This seems to bring about the rather extraordinary position that upon the exercise of the Registrar's discretion will depend the quality of the title acquired by the transferee. By section 10 it is only a new certificate of title, upon the cancellation of the old one, which is given a validity equal to that of the original Crown Grant. It is true that Seton C.J. in Cronin's case held that a memorial on the previous certificate of title acquired the same validity as a new certificate of title issued upon the cancellation of the old one. But the section does not say so, and no such inference can in our opinion be drawn from the wording of the section. Section 10 emphasizes that before the provisions relating to the title of the original grantee come into effect, there must be a cancellation of the Crown Grant or previous certificate of title. Unless and until there is such a cancellation of the previous document of title section 10 does not start to operate. In our view Seton C.J. placed a strained construction on the section to avoid the unfortunate consequence which would follow

a literal interpretation of the section. If it had been intended that a memorial under section 33 would have related the transferee's title back to that of the original grantee it would have been easy to say so.

In construing section 10 it is helpful to consider the history of the establishment of a form of Torrens system in Fiji. The first Ordinance was that of 1876, No. VII, which sets up a system of land registration. By section 9 it is provided that the original title to freehold lands acquired by persons in Fiji shall be in the form of a Crown Grant, held in fee simple from the Crown. By section 10 provision is made for a memorandum of mortgages or other encumbrances to be noted by way of memorial on the Crown Grant. Section 13 (which is the predecessor of section 10 of Cap. 120) deals with transfers, which are to be followed by the cancellation of the original Crown Grant and the substitution of a certificate of title. To make it clear that the registered proprietor under a certificate of title has a title as good in every way as that given by a Crown Grant, the section lays down that the title of the registered proprietor—and of subsequent transferees under fresh certificates of title—shall be as valid and effectual as if he had held under the original Crown Grant. The title conferred by the original grant in fee simple from the Crown, and evidenced by the Crown Grant, was a title of unimpeachable validity. It was apparently considered necessary that a new registered proprietor should know that he was losing nothing by receiving a certificate of title in lieu of a Crown Grant; and this provision was enacted in the Ordinance to the effect that a certificate of title was evidence of a title in all respects as good as that held under a Crown Grant. When that Ordinance came into effect there could be no question of any rights having been acquired by adverse possession against the person to whom the Crown Grant was issued under the Ordinance.

Although there are some differences in the wording of the two sections, the general effect of section 10 of Cap. 120 is similar to that of section 13 of the 1876 Ordinance. We are of the opinion that the meaning of section 10 is this: the title of the registered proprietor in a certificate of title shall be as valid and effectual as if the document of title he held were the original Crown Grant; that the extent of his estate in the land shall be precisely the same as the estate in fee simple originally granted from the Crown. But if he held the original Crown Grant and not a new certificate of title his rights would still be subject to encumbrances since created, and any rights, subsequently acquired, derogating from the right title and interest of the registered proprietor. These latter rights would include any arising from the fact of adverse possession in any person for the prescriptive period. That, in our opinion, is the true effect of section 10. The strongest and most unequivocal words would be necessary to give to that section the effect of over-riding the Statutes of Limitation which are part of the Laws of Fiji. Such words are not to be found in the section.

We hold that on a true construction of section 10, there is nothing in that section which establishes that the issue of a new certificate of title to a transferee from the registered proprietor revives a right title or interest in land which the registered proprietor has lost, and renders invalid a title which the adverse possessor had already acquired under the Statutes of Limitation in force in Fiji. In the result it follows that the appellant has acquired a good title to the land in dispute and no action can be maintained by respondents to eject her therefrom.

The judgment of Hammett J. is accordingly set aside and judgment entered for the defendant on the claim. On the counterclaim the defendant is entitled to a declaration that the title of plaintiffs to that portion of the land contained in Certificate of Title No. 7818 edged blue on the survey plan has been extinguished.