A

VILIAME RAKULI AND OTHERS

v.

PAULIASI NATIRI AND OTHERS

B

[COURT OF APPEAL, 1970 (Gould V.P., Tompkins J.A., Knox-Mawer J.A.), 22nd July, 12th August]

Civil Jurisdiction

Fijian—assignment of cane proceeds by Fijians—moneys paid thereunder—recoverability thereof—Agricultural Produce (Authorities by Fijians) Ordinance—retrospective repeal expressed to be of full force and effect from date selected—accrued rights—pending proceedings—Agricultural Produce (Authorities by Fijians) Ordinance (Cap. 205) s. 2—Agricultural Produce (Authorities by Fijians) (Repeal) Ordinance 1968 ss. 2, 3—Interpretation Ordinance 1967, s. 18, 18 (3) (b) (c) (e)—Interpretation and General Clauses Ordinance (Cap. 1) s. 13—Agricultural Holdings Act 1908 (8 Edw. 7, c. 28) (Imp.) s. 11—Interpretation Act 1889 (52 & 53 Vict., c. 63) (Imp.) s. 38—Interpretation Ordinance 1900 (Ceylon, c. 2) s. 6 (3)—Agricultural Holdings Act 1914 (4 & 5 Geo. 5, c. 7) (Imp.)—Landlord and Tenant (Rent Control) Act 1949 (13 & 14 Geo. 6, c. 40) (Imp.) s. 10.

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D

Interpretation—Ordinance—repeal with retrospective effect—repeal expressed to be of full force and effect from date selected—relevant provisions of Interpretation Ordinance not negatived—accrued rights—pending proceedings—Agricultural Produce (Authorities by Fijians) Ordinance (Cap. 205) s. 2—Agricultural Produce (Authorities by Fijians) (Repeal) Ordinance 1968 ss. 2, 3—Interpretation Ordinance 1967, ss. 18 (3), 18 (3) (b) (c) (e)—Interpretation and General Clauses Ordinance (Cap. 1) s. 13—Agricultural Holdings Act 1908 (8 Edw. 7, c. 28) (Imp.) s. 11—Interpretation Act 1889 (52 & 53 Vict., c. 63) (Imp.) s. 38—Interpretation Ordinance 1900 (Ceylon c. 2) s. 6 (3)—Agricultural Holdings Act 1914 (3 & 5 Geo. 5, c. 7) (Imp.)—Landlord and Tenant (Rent Control) Act 1949 (13 & 14 Geo. 6, c. 40) (Imp.) s. 10.

E

The appellants, being some of the members of an unincorporated cane growers society, on the 18th September, 1967, commenced an action in the Supreme Court against other members of the society and the sixth and seventh respondents, alleging that an assignment of cane crops was void by reason of contravention of the Agricultural Produce (Authorities by Fijians) Ordinance. Pursuant to the assignment the South Pacific Sugar Mills Ltd. (seventh respondent) had paid £4,636 11s. 8d. to Burns Philp (South Seas) Co. Ltd. (sixth respondent) and it was alleged these moneys were recoverable as having been paid under an instrument whereby a Fijian authorised payment of the proceeds of agricultural produce to a non-Fijian. Such an instrument, unless it fell within the exceptions to section 2 of the Agricultural Produce (Authorities by Fijians) Ordinance, would be void, and payments made in pursuance of it recoverable.

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The payments were made under the assignment between the 10th April, 1961, and the 24th June, 1966. On the 3rd April, 1968, the Agricultural Produce (Authorities by Fijians) (Repeal) Ordinance, 1968, was passed, repealing the Agricultural Produce (Authorities by Fijians) Ordinance and, by section 3, providing that the repeal should be deemed to have been of full force and effect from the 1st July, 1967.

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In the Supreme Court the trial Judge did not find it necessary to decide the primary question whether there was non-compliance with the mandatory provisions of sections 2 and 3 of the Agricultural Produce (Authorities by Fijians) Ordinance; he held that the retrospective nature of the repeal, together with the choice of the expression " of full force and effect " showed an intention to terminate all rights arising under the Ordinance and all actions contemplated or pending, as from the 1st July, 1967.

Held : 1. A statute is not to be construed so as to have a greater retrospective operation than the language renders necessary.

2. No greater effect is to be given to the Agricultural Produce (Authorities by Fijians) (Repeal) Ordinance, 1968, than that it sets the effective date of the repeal back to 1st July, 1967.

3. The repeal effected at that date takes effect subject to the relevant provisions of the Interpretation Ordinance.

4. If, on the facts, the assignment fell within section 2 of the Agricultural Produce (Authorities by Fijians) Ordinance, the rights indicated in that section accrued to the appellants before the effective repeal date and the right to take legal proceedings in relation thereto were preserved by section 18 (3) (*e*) of the Interpretation Ordinance.

Cases referred to:

Hamilton Gell v. White [1922] 2 K.B. 422; 127 L.T. 728.

Abbott v. Minister for Lands [1895] A.C. 425; 72 L.T. 402

Director of Public Works v. Ho Po Sang [1961] A.C. 901; [1961] 3 W.L.R. 39.

Free Lanka Insurance Co. Ltd. v. Ranasinghe [1964] 1 All E.R. 457; [1964] A.C. 541.

Lewis v. Hughes [1916] 1 K.B. 831; 114 L.T. 643.

Hutchinson v. Jauncey [1950] 1 K.B. 574; [1950] 1 All E.R. 165.

Appeal against a judgment of the Supreme Court in an action for the recovery of moneys alleged to have been paid under an assignment of the proceeds of agricultural produce by Fijians to a non-Fijian.

S. M. Koya for the appellants.

K. A. Stuart for 1st to 6th respondents.

R. G. Kermode for the 7th respondent.

The facts sufficiently appear from the judgments.

The following judgments were read:

GOULD V.P.: [12th August, 1970]—

This is an appeal against what is entitled a " Ruling " of the Supreme Court of Fiji—as it dismisses the action in question it is no doubt also a judgment.

The judgment deals with one point only, and the learned Judge stated that, in view of his ruling he did not find it necessary to deal with a number of other issues raised in the action.

As this course of action limits the scope of this appeal, I do not find it necessary to set out the lengthy pleadings. It is sufficient to say that the plaintiffs, who are the present appellants, alleged among other things, that an assignment of cane crops executed on the 10th April, 1961, by two Fijians (allegedly on behalf of other Fijians as well as themselves) and what has been called an " authority for upstamp-

ing " the said assignment executed on the 31st July, 1962, were void by reason of the Agricultural Produce (Authorities by Fijians) Ordinance (Cap. 205). It was agreed that between the 10th April, 1961 and the 24th June, 1966 the seventh defendant, South Pacific Sugar Mills Ltd. (which apparently acted upon the assignment, though it was addressed to the Colonial Sugar Refining Co. Ltd.), paid to the sixth defendant, Burns Philp (South Seas) Company Limited, under the assignment, the sum of £4,636 11s. 8d.

It was claimed that these moneys were recoverable under section 2 of the Agricultural Produce (Authorities by Fijians) Ordinance abovementioned.

It will be well to set out section 2 of the Ordinance, which reads—

" 2. Any instrument, not being—

(*a*) a crop lien; or

(*b*) an authority to pay any proceeds of agricultural produce—

(i) to any bank or to the Agricultural and Industrial Loans Board; or

(ii) into a Fijian's account with any bank or with the Agricultural and Industrial Loans Board; or

(*c*) an instrument approved under the provisions of this Ordinance whereby a Fijian authorises the payment to any non-Fijian of the whole or any part of the proceeds of any agricultural produce payable or to become payable to such Fijian shall be void and any payment made in pursuance of any such instrument shall be recoverable by the Fijian from the person making such payment."

It was claimed that the assignment in question was not an instrument approved under the provisions of the Ordinance but this issue of fact and law was not decided by the learned Judge in the Court below. He did not find it necessary to do so as he acceded to an argument that the Ordinance could not in any event be resorted to, by reason of the effect of the Agricultural Produce (Authorities by Fijians) (Repeal) Ordinance, 1968. This brief Ordinance was passed in Council on the 3rd April, 1968, and assented to on the 18th April, 1968. It has three sections, of which the second and third are—

2. The Agricultural Produce (Authorities by Fijians) Ordinance is hereby repealed.

3. The repeal effected by the last preceding section shall be deemed to have been of full force and effect from the 1st day of July, 1967.

The only additional relevant fact to which reference need be made, is that the proceedings in the Supreme Court were commenced by the Appellants on the 18th September, 1967, about two and a half months after the date to which the repeal was made retrospective.

Section 18 of the Interpretation Ordinance, 1967, contains the usual provisions relating to repeal. In particular section 18 (3) (omitting subsection (*d*)) reads—

" (3) Where a written law repeals in whole or in part any other written law, then unless a contrary intention appears, the repeal should not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or

(*d*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

In case anything might be thought to turn upon the date at which this Ordinance came into effect, it is to be observed that these provisions replace, with no material alteration, similar provisions in section 13 of the Interpretation and General Clauses Ordinance (Cap. 1) theretofore in force.

The essence of the learned Judge's judgment is contained in the following paragraph:—

" I have examined the Repealing Ordinance in the light of the provisions of section 18 of the Interpretation Ordinance (No. 11 of 1967) bearing in mind in particular the expression " unless a contrary intention appears ", that the repeal shall not affect any right, privilege or obligation or any legal proceedings or remedy in respect of any such right, privilege or obligation. In my view it is important to bear in mind that Ordinance No. 11 of 1968 is not an Ordinance which " repeals and re-enacts " (as is envisaged by subsection (2) of Section 18 of the Interpretation Ordinance) but repeals simpliciter with effect from the 1st July, 1967 making the repeal of full force and effect from that date. There is no saving clause in this Ordinance. I have come to the conclusion that the legislature's deliberate choice of the expression of " full force and effect " and its decision to make the repeal retrospective to the 1st day of July, 1970 demonstrate a clear intention of applying a legislative guillotine to all rights, privileges, obligations and to all actions contemplated or actually pending before a Court in respect of those rights, privileges or obligations arising under or by virtue of the Agricultural Produce (Authority by Fijians) Ordinance, as from the 1st day of July, 1967. I therefore rule that even if I were satisfied that there was non-compliance (although I do not rule either way at this stage) with the mandatory provisions of sections 2 and 3 of the Agricultural Produce (Authority by Fijians) Ordinance that Ordinance cannot now be resorted to for upsetting any contractual arrangement which was otherwise lawful and proper."

The essence of this finding is that the wording of the repealing Ordinance of 1968 is sufficient, not only to antedate the repeal itself to the 1st July, 1967, but also to override those portions of section 18 (3) of the Interpretation Ordinance which would, in the case of an ordinary repeal, preserve rights and privileges accrued or acquired under the repealed Ordinance. The learned Judge did not decide whether any such rights had in fact accrued.

I will deal first with the question of the proper interpretation of the repealing Ordinance. Mr. Koya, for the appellants, submitted that the words " of full force and effect " were mere surplusage and did no more than declare the date from which the repeal was to be effective. Mr. Kermode, on the other hand, argued that the words " full force and effect " gave a very clear indication of the intention of the legislature, and that intention was completely to obliterate the repealed Ordinance as from the specified date, as if it had never existed. Otherwise, he submitted, it could have all been put in section 2 by words such as—" . . . . is hereby repealed with effect from the 1st day of July, 1967 ".

If only by reason of its brevity the repealing Ordinance is one difficult to construe. There is no indication at all as to why the 1st July, 1967 should have been chosen as to the effective date. The Agricultural Produce (Authorities by Fijians) Ordinance appears to have been one enacted as part of public policy for the protection of the Fijians by requiring certain precautions to be taken and formalities observed before valid assignments could be given of the proceeds of their agricultural produce. Nothing can be drawn from that, to explain why, if it is desired to repeal the Ordinance, the appeal should be made retrospective.

A

As to the form and wording of the Ordinance, the legislature was taking a very unusual course. There is a presumption against legislation generally having retrospective effect, except in procedural cases, and a retrospective repeal must be one of the more unusual forms of retrospective legislation. May the form not have been chosen to show no more than that the legislature was aware that it was doing something unusual and desired to use emphatic terms to show that the action was considered and deliberate ?

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At first glance the words " full force and effect " may seem to have an intensifying effect, but does not every repeal take full force and effect as from its date ? The possible answer I see to this question is—" No. It takes effect subject to the provisions of section 18 of the Interpretation Ordinance, which among other things preserves certain accrued rights. Therefore it only takes full force and effect if these limitations are disregarded." But that raises the difficulty whether all or only part (and which part) of section 18 is to be disregarded. If for example, Mr. Kermode's contention that the intention was to completely obliterate the Ordinance as if it had never been, that would involve the negation of section 18 (3) (*b*) which embodies the common law principle that a repeal does not affect matters past and closed: (*Maxwell on Interpretation of Statutes* (11th Edn.) p. 390). I could not accept such a proposition, and if section 18 (3) (*b*) is to remain effective why should it be considered that the retrospective effect should extend to and negative subsections (3) (*c*) and (3) (*e*) of the same section ?

D

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I think the question in issue must be answered by the application of principle. The rule of construction against giving legislation retrospective effect has two aspects for " it involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than the language renders necessary ": *Maxwell on Interpretation of Statutes* (12th Edn.) p. 216. On that basis I do not think it is right to give greater effect to the Agricultural Produce (Authorities by Fijians) (Repeal) Ordinance, 1968, than to hold that it sets the effective date of the repeal back to the 1st July, 1967, but that the repeal, as at that date, takes effect in the usual way, i.e. subject to the provisions of the relevant sections of the Interpretation Ordinance. I do not think that, in the words of the section, " a contrary intention appears ".

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In these circumstances, Mr. Koya submits (on the assumption that the transaction in question can be shown to be contrary to section 2 of the Agricultural Produce (Authorities by Fijians) Ordinance) that, although his action was not commenced until a date later than the 1st July, 1967, he had an accrued right to a declaration that the instrument in question was void, and for the recovery of any payment made pursuant thereto. By virtue of section 18 (3) (*c*) of the Interpretation Ordinance his " right . . . . accrued " was not affected, and under subsection (3) (*e*) his right to institute legal proceedings to enforce his accrued right was preserved I did not understand Mr. Kermode to oppose this aspect of the argument very strongly and I do not propose to examine the relevant authorities in great detail.

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A The four leading cases referred to in argument were *Abbott v. Minister for Lands* [1895] A.C. 425, *Hamilton Gell v. White* [1922] 2 K.B. 422, *Director of Public Works v. Ho Po Sang* [1961] A.C. 901 and *Free Lanka Insurance Co. v. Ranasinghe* [1964] 1 All E.R. 457.

In *Abbott's* case, the question was one of a right to make a further conditional purchase of land under a repealed Act (which saved all rights accrued under the Act) which had conferred such a right upon the owners of lands in fee simple. At page 431 it was said, that it may be that the power to take advantage of an B existing enactment is a right. But their Lordships thought it was not a right " accrued "—that the mere right existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a right accrued within the meaning of the enactment. This case might be thought at first sight to favour the respondent's case, but upon reflection it is clearly distinguishable. For here, provided the case fell within the section, the appellants C individually acquired specific and personal rights under section 2 of the Ordinance, once payments had been made, and these rights did not depend on their own subsequent acts.

Hamilton Gell v. White was a case in which a tenant, who was given notice to quit, became, subject to certain conditions, entitled to compensation under section 11 of the Agricultural Holdings Act, 1908. The conditions were that within two months after notice to quit, he should give the landlord notice of his intention to claim D compensation, and that he should make his claim within three months after quitting. He duly gave notice, but the Statute was repealed before the time came at which he could claim. It was held that as soon as the landlord gave notice to quit the tenant acquired a right, subject to his satisfying the conditions of the section. The Court said that as soon as the notice to quit was given in view of a sale, the section itself conferred the right to compensation, subject to the tenant complying with the conditions specified. So far as it was possible, the tenant had complied E with them. It is significant that Lord Scrutton added that the tenant acquired a right to have his claim determined by arbitration. In the course of the arbitration he would no doubt have to prove that the right existed, i.e. that the notice to quit was given in view of a sale, and prove the measure of his loss. Likewise, in the present case the appellants would have to prove that their claim fell within section 2 of the Agricultural Produce (Authorities by Fijians) Ordinance.

F In the *Director of Public Works v. Ho Po Sang*, the Director indicated his intention to grant a building certificate. He had no actual power to grant it until after appeals had been made to and heard by the Governor, whose decision would be final. The relevant legislation was repealed before the appeals were heard. It was held that there was no accrued right to a certificate—there was not more than the hope of a right which was not the same as an accrued right. As to the asserted right to have the investigation (the appeals to the Governor) continued, it was held G that such a right applied only to rights accrued at the date of the repeal.

In *Free Lanka Insurance Co. v. Ranasinghe* a party injured in an accident sued the defendant, and gave within the required seven days, notice of his action to the insurers. Under the then law, the insurers, therefore, became liable to pay the amount of the decree. On the 1st September, 1951, the relevant Ordinance was repealed. Judgment against the defendant was obtained on the 24th September, 1951. It was held that under the Interpretation Ordinance, on the 1st September, H 1951 the injured party had " acquired a right " against the appellants (the insurers); something more than a hope or expectation of a right—though it might be called incohate or contingent. The Court adapted the words of Lord Morris of Borth-y-Gest in the *Ho Po Sang* case (at p. 922)—

" It may be that a right has been given, but that in respect to it some investigation or legal machinery is necessary. The right is then unaffected and preserved. It will be preserved even if a process of qualification is necessary. But there is a manifest distinction between an investigation in respect of a right, and an investigation which is to decide whether some right should or should not be given."

A

In my opinion, these authorities support the case for the appellants. If the instrument upon which they rely falls within section 2 of the Agricultural Produce (Authorities to Fijians) Ordinance they acquired the rights indicated in the section, and it matters not, that after the repeal they still have to establish that their case was actually within the section. What they seek to establish is not the hope of a right but a right which, if it exists at all, was conferred by the section and accrued before the effective repeal date.

B

What I have said applies to the right to have the instrument declared void and to the recovery of any sums paid in pursuance of the instrument up to the 1st July, 1967. It would appear that all moneys referred to in the agreed statement of facts were paid by June, 1966, so it is not strictly necessary to deal with the situation after the 1st July, 1967. Though that matter has not been argued, I would have been of the opinion that, had payments been made in pursuance of the assignment between the 1st July, 1967, and the date of coming into effect of the Agricultural Produc (Authorities by Fijians) (Repeal) Ordinance 1968, the appellants could not have recovered them under section 2 of the repealed Ordinance. No right to recovery would have accrued under the section, simply because a right of recovery of a payment cannot accrue until that payment has been made. No right under the section would, therefore, have accrued as at the 1st July, 1967. As no such payments appear to have been made, the question of what legal and factual considerations would in such an event have governed the situation does not arise.

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Mr. Kermode gave notice that he wished to support the judgment under appeal under grounds other than those relied upon by the learned Judge. The case was a complex one and the learned Judge referred to a number of other issues which he found it unnecessary to deal with. Though he made in passing one finding relative to the agency of the persons who signed the assignment and authority, he expressed no opinion as to the effect of such agency and made no finding upon the vital question of whether the assignment and authority were or were not in contravention of section 2 of the Agricultural (Authorities by Fijians) Ordinance. There are proceedings on a counter-claim by Burns Philp (South Seas) Co. Ltd., the continuance of which apparently hinges on the result of the proceedings between the other parties.

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I take the view that, upon a written record of evidence only, and in the absence of adequate findings of fact and law in th Supreme Court, it would be wrong for this Court to attempt to decide the matters raised by Mr. Kermode on his Notice and I do not, therefore, propose to deal with them.

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I would allow the appeal, set aside the dismissal of the action and remit the case to the Supreme Court for decision of the issue of fact and law left undecided (hearing further argument and if necessary further evidence in his discretion). The position as to the counter-claim will remain as it was before judgment was given in the Supreme Court.

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The 7th respondent will pay the appellants' costs of the appeal—there will be no order for the costs of the respondents 1–6, who took no part in the proceedings.

All members of the Court being of the same opinion, the appeal is allowed and there will be the orders I have indicated above.

TOMPKINS J.A.:

I have read the judgment of the learned Vice President in this case and with respect agree with the conclusions he has reached and with the reasons for reaching those conclusions set out in his judgment. There are, however, several observations of my own that I would like to add.

It is not necessary, I think, for me to go through the facts again because these are already fully set out in the judgment already read. But I think it is useful to set out in order the various relevant dates. I think they are:—

1. 21st December, 1954, the Agricultural Produce (Authority by Fijians) Ordinance, Cap. 205, (which Ordinance I shall hereafter call Ordinance Cap. 205), came into force;
2. 10th April, 1961, assignment of sugar proceeds executed by President and Secretary of Drakoro Cane Growers Association, such assignment being upstamped in July 1962;
3. 19th February, 1962, sugar contract executed on behalf of Drakoro Cane Growers Association by the Chairman of the Association;
4. Between 10th April, 1961, and 24th June, 1966, the sum of £4,636 11s. 8d. was paid out under the said assignment;
5. 1st July, 1967, the Agricultural Produce (Authority by Fijians) (Repeal) Ordinance 1968 (which I shall hereafter call Ordinance No. 11/68), came into retrospective effect;
6. 18th September, 1967, these proceedings commenced;
7. 18th April, 1968, Ordinance No. 11/68 was enacted, repealing Ordinance Cap. 205 with retrospective effect from 1st July, 1967.

Section 2 of the Ordinance Cap. 205 provided that any assignment of agricultural produce not executed in accordance with the formalities prescribed by the Ordinance should be void and any payment made under such an assignment should be recoverable by the Fijians.

Section 3 of the Ordinance No. 11/68 provided as follows:—

> " The repeal effected by the last preceding section shall be deemed to have been in full force and effect from 1st July, 1967."

It is to be noted that these proceedings were commenced after the 1st July, 1967, the date on which the repeal takes retrospective effect, but before the date of enactment of the repeal on 18th April, 1968.

The question to be considered in this judgment is the effect of this repeal upon these proceedings. I shall confine my judgment to this question. The learned trial Judge held that the repeal " applied a legislative guillotine to all rights, privileges, obligations and to all actions contemplated or actually pending before a court in respect of those rights, privileges or obligations arising under or by virtue of the Agricultural Produce (Authority by Fijians) Ordinance as from 1st July, 1967 ", and he accordingly dismissed the action. It was accordingly unnecessary for the learned Judge to make any finding as to whether the assignment complied with the provisions of Ordinance Cap. 205. I do not think this Court should adopt the role of the trial Judge in finding facts not found by him. However, assuming for the purposes of this judgment only that the assignment does not comply with

the Ordinance, I shall proceed to consider whether upon such assumption the provisions of the repealing ordinance prevent any refund from being recovered by the plaintiffs. The moneys paid or payable under the assignment fall into three groups:— A

(*a*) those moneys paid before 1st July, 1967, when the repealing Ordinance took effect;

(*b*) those moneys paid or payable between 1st July, 1967, and the date of enactment of the repeal, namely 18th April, 1968; B

(*c*) those moneys paid or payable after 18th April, 1968.

Mr. Kermode for the 7th defendant submits that the use in the repealing ordinance of the words " shall be deemed to have been in full force and effect from 1st July, 1967 " shows that the legislature meant that the Ordinance Cap. 205 was obliterated, as if it had never been passed, and accordingly showed an intention of the legislature to prevent enforcement of any rights accrued under the Ordinance, both before and after 1st July, 1967. C

Mr. Koya for the plantiffs submits that accrued rights vested in the plaintiffs prior to 1st July, 1967, are preserved by section 18 (3) of the Interpretation Ordinance, Cap. 11/67; and that the legislature must use the plainest language to extinguish such rights; and that the words used in the repealing ordinance are not capable of that meaning.

The relevant part of section 18 (3) of the Interpretation Ordinance, Cap. 11/67 is as follows:— D

" Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not—

.....

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or E

(*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made." F

In *Hamilton Gell v. White* [1922] 2 K.B. 422 a tenancy under the Agricultural Holdings Act 1914 had been determined by notice to quit and the tenant had given due notice claiming compensation. But before his claim for compensation had been made the section which conferred the right upon him was repealed. Consequently his claim for compensation was actually made after the repeal took effect. He was held entitled to pursue his claim. Atkin L.J. at 431, after quoting section 38 of the Interpretation Act 1889 which is substantially the same as section 18 quoted above, said:— G

"It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of H

one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has ' acquired a right ', which would ' accrue ' when he has quitted his holding, to receive compensation."

In *Abbott v. Minister for Lands* [1895] A.C. 425 the Privy Council was considering the right of a holder of a conditional purchase to take advantage of the provisions of a repealed statute to make additional conditional purchases under that statute. The Lord Chancellor in delivering judgment at 431 said:—

" It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far reaching. It may be, as Windeyer, J. observes, that the power to take advantage of an enactment may without impropriety be termed a ' right ' but the question is whether it is a ' right accrued ' within the meaning of the enactment which has to be construed. Their Lordships think not. . . . . They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them, to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a ' right accrued ' within the meaning of the enactment."

In *Director of Public Works v. Sang* [1961] A.C. 901 the question was whether a right to apply for a re-building certificate was preserved after the repeal of the ordinance giving the right. Lord Morris of Borth-y-Gest in delivering the judgment said at 922:—

" It may be, therefore, that under some repealed enactment a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given. Upon a repeal the former is preserved by the Interpretation Act. The latter is not."

The Privy Council held that, although notice applying for the certificate had been only given before the repeal, that gave no right to a re-building certificate but only a hope or possibility of obtaining a certificate. It held that the right was not an accrued right preserved by the ordinance.

In *Free Lanka Insurance Co. v. Ranasinghe* [1964] 1 All E.R. 457, the plaintiff suffered an accident in 1948. He sued for damages on 27th March, 1950; on 24th September, 1951 he was awarded damages against the offending driver, who was insured under an ordinance of 1938 which was repealed on 1st September, 1951. It was held that the respondent had acquired a right which was not affected by the repeal. In delivering the judgment of the Privy Council Lord Evershed said at 461 (1):—

" The Board respectfully agrees with the Supreme Court in thinking that the respondent had, on Sept. 1, 1951, ' acquired a right ' against the appellants within the meaning of para. (*b*) of section 6 (3) of the Ceylon Interpretation Ordinance of 1900. . . . . The distinction between what is and what is not ' a right ' must often be one of great fineness. But their lordships agree with Gunasekara, J. in thinking that, on Sept. 1, 1951, the respondent had as against the appellants, something more than a mere hope or expectation—

that he had in truth a right, within the contemplation of s. 6 (3) of the Interpretation Ordinance, under s. 133 of the ordinance of 1938, although that right might fairly be called inchoate or contingent." A

The first question is whether the plaintiffs had any accrued right before 1st July, 1967, to claim the refund from the 7th defendant. In order to prove such a claim they must first prove that the assignment was not executed in accordance with the provisions of the Ordinance Cap. 205. But the question of compliance or non-compliance with the ordinance depends upon what took place in 1961 when the assignment was executed. The next fact the plaintiffs must prove is that payments had been made under the assignment. It is admitted that the refunds claimed were for payments made before 1st July, 1967. The only act necessary to be taken after 1st July, 1967 is the action for enforcement of the right. In my view the plaintiffs, assuming they could prove non-compliance with the Ordinance Cap. 205 had an accrued right to a refund under the ordinance which was in existence, though unenforced, at the crucial date of 1st July, 1967. The power to enforce that right by instituting legal proceedings is expressly preserved by section 18 (3) (*e*) of the Interpretation Ordinance unless a contrary intention appears in the repealing Ordinance. B C

Many legal writers have criticised statutes which provide for retrospective effect. They consider such statutes unjust because they purport to take away rights which accrue under existing unrepealed statutes. But the right of the legislature to make a statute retrospective is not challenged. Here the legislature has made the repealing ordinance retrospective to 1st July, 1967. Does the language used, namely, " the repeal effected by this section shall be deemed to have been in full force and effect f om 1st July, 1967 " show an intention on the part of the legislature to extinguish rights accrued before that date ? I do not think so. *Maxwell on Interpretation of Statutes*, 11th Edn., says at p. 205:— D

" A statute is not to be construed to have a greater retrospective operation than its language renders necessary." E

Here the repeal is made retrospective to 1st July, 1967. The mere fact of placing a limit to the back dating of its effect is against any interpretation that it is intended that rights accrued before then shall be affected. Why set the 1st July, 1967, as the limit of the retrospective effect of the repeal if it were intended that it should affect rights accrued before that date ? It may well be said that the special words used mean no more than that the repeal shall take effect as at that date. If a repeal takes effect at that date surely it must be in full force and effect after that date. But one must, if possible, assign some reasonable meaning to the unusual words used. Here, the repeal was made retrospective for a period of some 15 months. Deductions under void assignments might be made during that period. It might be claimed that Fijians had an accrued right to recover such deductions under the Ordinance of 1938 which was, when the deductions were made, unrepealed. I think that the words used may well show an intention on the part of the legislature to exclude any rights which accrued after 1st July, 1967, but before the date of enactment of the repeal. F G

A somewhat similar, but unsuccessful, claim that special language excluded rights existing at the date of the repeal was made in *Lewis v. Hughes* [1916] 1 K.B. 831. There a claim under an enabling section was made and proceedings were pending when the section was repealed. Swinfen Eady L.J. at 836 said:— H

" Reliance is placed by the plaintiff on the words in section 18 of the Act of 1915 ' shall cease to have effect '. I am unable to attach to those words the extended meaning claimed for them. When an Act is repealed it ceases to have effect. The words do not, in my view, indicate any contrary intention so as to exclude the provisions of section 38 of the Interpretation Act, 1889."

A case in which a statute was held to show an intention to exclude existing rights accrued is *Hutchinson v. Jauncey* [1950] 1 All E.R. 165. In that case the landlord, relying upon a decision that a tenancy was not protected where the tenant shared his scullery for cooking purposes with another tenant, commenced proceedings on 25th May, 1949 for ejection of the tenant. On 2nd June, 1949 while the proceedings were pending, a new act came into force which negatived the effect of the decision upon which the landlord relied. This act provided:—

> " The three last foregoing sections shall apply whether the letting in question began before or after the commencement of this act, but not so as to affect rent in respect of any period before the commencement thereof or anything done or omitted during any such period."

Sir Raymond Evershed M.R. at 167 (H) said:—

> " It is said that, nevertheless, by the issue of the plaint the landlord has acquired a vested right, a cause of action has accrued, and he should not be deprived by the court of that right unless in plain terms that conclusion flows from the language of the new Act."

At 168 (B) he said:—

> " It seems to me that, if the necessary intendment of the Act is to affect pending causes of action, the court will give effect to the intention of the legislature even though there is no express reference to pending actions."

He held that the Act applied retrospectively to protect and save the tenant and that it did extinguish the right of the landlord to continue his pending action.

With the greatest respect to the opinion of the learned trial Judge I do not think the words used here are such as to show an intention to extinguish rights accrued before the retrospective date fixed for the operation of the repeal. I think those rights are preserved by section 18 (3) (*c*) and (*e*) of the Interpretation Ordinance.

Accordingly I think the learned Judge was wrong in dismissing the claim of the plaintiffs on the ground that they could not rely upon the Ordinance of 1938 in support of rights accrued before 1st July, 1967. This deals with the first of the 3 classes of claims for refund mentioned at the beginning of this judgment.

In respect of claims of the second class, that is claims under the Ordinance Cap. 205 for refunds of amounts paid or payable between 1st July, 1967, and 18th April, 1968, I think such claims are extinguished by the provisions of the repealing Ordinance 1968 because I think that in that Ordinance a contrary intention to their preservation does appear.

In respect of claims of the third class, for a refund of payments made after the date of enactment of the repealing ordinance, I do not think it is possible for the plaintiffs to rely upon the repealed Ordinance Cap. 205 to obtain a refund.

As stated at the beginning of this judgment I agree with the orders proposed by the learned Vice-President. This Court is not a fact finding body and I think the learned trial Judge must now, in the light of the decision of this Court, consider the case afresh and make his findings accordingly.

KNOX-MAWER J.A.:

I have read the learned judgments of Gould V.P. and Tompkins J.A. I agree with the conclusions which they have reached.

I am not persuaded that the words " full force and effect " in section 3 of the Agricultural Produce (Authorities by Fijians) (Repeal) Ordinance render it necessary to construe this repealing Ordinance with such drastic consequences as Mr. Kermode's interpretation would entail; for to take but one example, it would entail, as has been pointed out, the negation of section 18 (3) (*b*) of the Interpretation Ordinance. A

Like my learned brother, I have studied the relevant case law very carefully indeed, but ultimately I have reached my conclusions without reservation. B

I would allow the appeal and remit the case to the Supreme Court. I endorse the order as to costs contained in the learned Vice-President's judgment.

Appeal allowed ; case remitted to Supreme Court.