COURT OF APPEAL

FROM A COURT FOR NATIVE AFFAIRS.

BUSIN also known as LEVIN of Lemankoa

Appellant

- and -

HAVINI of Lemammanu

Respondent.

J U D G M E N T.

This is an appeal against an order made by a Court for Native Affairs held at LEMANKOA, Bougainville on the 17th October, 1955 whereby the Court found in favour of the Respondent HAVINI and declared the land known as TICHI or CHICHIL to belong to HAVINI and his sister TOPU.

The grounds of the appeal were originally:-

(a) the decision is against the evidence and the weight of the evidence; and

(b) the evidence given for Defendant contained material mis-statements of facts.

By leave of this Court a further ground was added, viz:-

(c) that the Court for Native Affairs had no jurisdiction to make the said order.

The main argument centred upon Ground 3 and it is with this ground that I will deal firstly and with the Appellant's Counsel's submission on this ground that Sections 8 and 10 of the Native Lands Registration Ordinance 1952 impliedly, pro tanto, abrogate the power conferred, by Regulation 7(b) of the Native Administration Regulations 1924 of the Territory of New Guinea, upon a Court for Native Affairs to hear disputes over the ownership of land.

The power as to land as apart from other civil claims is referred to specifically in Regulation 59 under Part III of the Native Administration Regulations 1924, the Part dealing

with civil claims. Regulation 59 is as follows:-

> "Where a court decides any claim involving the ownership of or the right to the occupation or use or possession of land or water or the right to the produce of any land or water or trees, the court shall cause the evidence to be taken down in writing and shall transmit a copy thereof to the Commissioner of Native Affairs."

The Native Land Registration Ordinance 1952 came into operation on 26th June, 1952 applying, of course, to the whole of the Territory of Papua and New Guinea. By its long title it is "an Ordinance to provide for the ascertainment and registration of the ownership of native land."

In the Native Land Registration Ordinance 1952 there is no express repeal of the power given to a Court for Native Affairs to decide the ownership of land and the question is, therefore, whether or not there is an implied repeal of such power by the later Ordinance.

The principles of implied repeal are stated in Craies on Statute Law 5th Edition p. 337:-

> "Where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the earlier. The Court leans against implying a repeal, 'unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. Special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together.' 'The latest expression of the will of Parliament must always prevail.' It does not matter whether the earlier or the later enactment is public, local and personal, or private, or is penal or deals with civil rights only, and the rule is equally applicable to Orders in Council or rules of Court if they have statutory force and are made under authority empowering the rule-makers to supersede prior enactments as to procedure. Before coming to the conclusion that there is a repeal by implication the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the later, imply the repeal of an express prior enactment - i.e., the repeal must, if not express, flow

from necessary implication."

In deciding whether there is an implied abrogation of an earlier statute, one must see whether the two can stand together and also regard must be had to the object of the later legislation, its scope and its implications.

There existed under the Native Affairs Regulations (New Guinea) since 1924 the power to decide the ownership of native land. In the corresponding Papuan Regulations, called the Native Matters Regulations, the power to decide the ownership of native land by a Court for Native Matters was strictly excluded.

The Legislature no doubt sought to put the whole of native lands in the Territory of Papua and New Guinea on a regular footing, for it passed the Native Land Registration Ordinance 1952. It was designed to bring gradually all native lands under the Ordinance after the manner of the Torrens System.

In the Native Land Registration Ordinance 1952 which is wholly devoted to the purpose, a Commissioner was provided for and all the procedural powers necessary to the performance of his duty were included. It was comprehensive legislation to deal with the subject of the ownership of native land in the whole Territory. On the other hand there existed in New Guinea only one regulation giving power to a Court for Native Affairs to decide the ownership which appeared in a mass of Regulations dealing generally with the affairs of natives.

In Bramston v. Colchester (1856) 6 E. & B. p. 246, it was held that the provisions of a local Act under which certain arrangements had been made for maintaining borough prisoners in county gaols were repealed by Section 18 of the general Prisons Act 1842 "for" said Lord Campbell, C.J., "I think it was the intention of the Legislature to sweep away all local peculiarities though sanctioned by special acts and to establish one uniform system except in so far as there are express exceptions."

I think it can be presumed that it was the intention of the Legislature to have one comprehensive and uniform enactment to resolve the peculiarities or differences erstwhile obtaining in the two Territories.

The question is whether the two powers could stand together. If the two can not stand together then the Court has no alternative but to declare that the earlier is repealed by the later for it must be taken that that was intended by the Legislature. Dr. Lushington said in The India (1864)

33 L.J. Adm. "The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or if the two statutes together would lead to wholly absurd consequences; or if the entire subject matter were taken away by the subsequent statute."

One can readily conceive the absurd results which would flow from the right to decide the ownership of native land existing in the two functionaries.

For example the Native Lands Commissioner seeks to carry out the imperative duty imposed upon him by the Ordinance under which he operates by determining the ownership of certain native lands and he finds it has already been decided by the Patrol Officer of the District. It would be impossible for the Native Lands Commissioner to make a determination with subsequent registration as he is required to do.

The general duties of the Commissioner are set out in Section 8, Division 1 of Part II as follows:-

> "The Commissioner shall inquire into and determine -
>
> (a) what land in each District of the Territory is the rightful and hereditary property of natives or native communities by native customary right; and
>
> (b) the natives or native communities by whom and the shares in which that land is owned."

Then in Division 2 of Part II and in the following Parts there is found elaborate machinery for the determination of the ownership and registration of Native Land for Survey and for Appeals. There is a Native Land Appeal Court established under Part VI consisting of a Judge of the Supreme Court with a definite right of appeal from that Court to the High Court upon a question of law.

If in New Guinea the two jurisdictions can stand together an unsuccessful party to a land dispute before a Patrol Officer could appeal to a Court of Appeal for Native Affairs with the inherent right of unrestricted appeal to the High Court, but in the other case where the Commissioner tribunal determines the matter there is an appeal from a Native Land Appeal Court to the High Court only on a question of law.

In Papua an appeal to the High Court could only be on a question of law. It was surely never intended by the legislature that there should be a differentiation in the two

Territories of this nature.

Mr. O'Shea for the Respondent argued ingeniously that what the Patrol Officer decided was something less than the ownership, and that his decision was in personam. But it seems to me that he was deciding the exclusive hereditary right of property in the land by native custom. The Record shows that. The Commissioner under the Ordinance is to determine nothing more than that, for his duty is to "inquire into and determine what land in each District of the Territory is the rightful and hereditary property of natives or native communities by native customary right." The two tribunals if they could stand as alternatives would be doing the same thing. This would be incompatible.

Sir Samuel Griffith puts it "that where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication." - per Griffith C.J. in Goodwin v. Phillips (1908) 7 C.L.R. at p. 7. In my view the two provisions are wholly inconsistent.

In Regulation 59 of the Native Affairs Regulations there are powers of determination given to the Magistrate of the Court for Native Affairs. These relate to rights which are less than ownership and they remain under thejurisdiction of the Magistrate. These matters are not touched by the Native Lands Registration Ordinance. Neither is the power given to a Magistrate for Native Matters to determine the rights inter partes under Regulation 132 of the Native Regulations of Papua, touched by the Native Land Registration Ordinance 1952.

In my view, the Native Land Registration Ordinance repeals by implication that part of Regulation 59 of the Native Affairs Regulations which gives the power to a Magistrate of a Court for Native Affairs to decide the ownership of land.

There were other grounds submitted in the Notice of Appeal but they are not now pertinent to the appeal, as I view the matter.

The result is that I find that the Patrol Officer in his capacity of a Magistrate for Native Affairs had no jurisdiction to determine between the parties the ownership of the land in question.

The appeal is upheld.

J. 19/7/57.