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In the Privy Council.

UNIVERSITY OF LONDON  
W.C.1.

No. 101 of 1946.

9 - NOV 1956

ON APPEAL FROM THE SUPREME  
COURT OF FIJI

INSTITUTE OF ADVANCED  
LEGAL STUDIES

CASE FOR THE APPELLANT

BETWEEN

THE ATTORNEY-GENERAL OF THE COLONY OF  
FIJI ... .. APPELLANT

AND

J. P. BAYLY LIMITED ... .. RESPONDENT.

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CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal from a Judgment of the Supreme Court of Fiji (Thomson J.), dated the 19th September, 1946, which purported to decide a question not in issue, namely, the right of the Crown to remove gravel from beds of streams without paying compensation to riparian owners. pp. 25-29

2.—By a statement of complaint dated the 14th March, 1944, the Respondent, who is the owner of the freehold of land at Wainadoi through which runs a stream known as Wainadoi Creek, alleged that quantities of gravel had been removed by the Director of Public Works from gravel deposits adjacent to the Wainadoi stream but not forming part of the bed thereof, and claimed a declaration that such gravel deposits were upon the land of and belonged to the Respondent and were upon land which did not form part of the bed of the Wainadoi stream, and a declaration that the Respondent was entitled to damages under Section 14 of the Roads Ordinance, and an inquiry into the quantity of gravel removed, and an order for payment of compensation, damages and costs. p. 1  
p. 1, 1.24-p2, 1.4 ; p.3, 1.39  
p.2, 11.5-36  
p.2, 1.43-p.3, 1.10

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3.—On the 13th April, 1944, the Governor in Council gave the necessary consent to the preferment of this claim. p.3, 1. 17

4.—By paragraph 10 of the statement of complaint the Respondent admitted that all streams and the beds thereof belong to the Crown but alleged that gravel had been removed from parts of the Respondent's land which did not form part of the bed of the stream. This admission was clearly intended by the Respondent and was understood by the Appellant p.2, 11.32-36

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RECORD to mean that the Respondent claimed no rights in that part of the water-course which constituted in law the bed of the stream or in gravel taken therefrom.

p. 3, l.31 5.—The Appellant in his statement of defence admitted taking  
p. 4, ll.1-20 quantities of gravel in and adjacent to the Wainadoi stream but alleged that all gravel so taken had been removed from the bed of the stream and not from the land of the Respondent.

6.—The principal matter in issue between the parties was therefore the precise limits of the bed of the Wainadoi stream where it passed through the Respondent's land and no question arose on the pleadings as to the rights of ownership in the bed of the stream. 10

p. 5 7.—The case came on for hearing before Thomson J. on the  
p. 5, l.20 12th August, 1946; the Judge and Counsel visited the site on the  
p. 5, ll.23-30 13th August, and on the 14th August the following issues were framed :—

1. Issue to ascertain places from which Public Works Department have taken gravel.
2. Do these places constitute in law the bed of the stream ?
3. If the Defendant has taken unlawfully is the Plaintiff entitled to damages and if so how much ?

pp. 6-12 8.—Evidence relevant to these issues was taken on the 14th, 15th and 20  
16th August, 1946. The evidence for the Respondent was directed to showing that the Director of Public Works had removed gravel and earth from the high banks and other places rarely, if ever, covered by the waters of the stream. The evidence for the Appellant was directed to showing that the gravel had been taken from gravel deposits brought down by the stream when in flood and covered several times every year by the waters of the stream itself. Counsel then addressed the Court and Judgment was reserved.

pp. 13-21

p. 21, l.24-  
p. 22, l.36

pp. 23-24 9.—On the 30th August, 1946, Counsel at the request of Thomson J. argued the following questions :— 30

1. Does Section 5 of the Rivers and Streams Ordinance (or any other statutory provision outside the Roads Ordinance) give the Crown the right to remove portions of the bed of a stream *ex situ* for purposes not connected with the stream ?
2. Has the Plaintiff any claim to compensation other than under the Roads Ordinance ? And if not, to what extent are his procedure for and time of setting up a claim governed by Section 22 of the Ordinance ?

10.—At the hearing the relative ordinances were cited as printed in the current 1946 edition of the Revised Laws of Fiji. There is no difference 40

which could have any bearing on this case between the relevant provisions as they appear in the 1946 edition, and in the 1924 edition with subsequent amendments which was in force at the material time. For convenience, therefore, this Case also uses the 1946 edition in referring to ordinances.

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11.—The Rivers and Streams Ordinance is printed in full in the record. Section 2 clearly vests in the Crown the soil under “rivers.” Section 5 provides that streams with the bed thereof belong to the Crown to be perpetually open to the public. By Section 6 Section 5 applies to the upper courses of rivers not navigable by takias or canoes. As the Respondent’s claim was framed and on the issues as settled it was unnecessary to lead evidence or advance arguments directed to showing whether the Wainadoi creek is a river as defined by Section 2. Had the question been material the Appellant would have desired to call evidence upon it.

pp. 31-34

12.—The material provisions of the Roads Ordinance (Chapter 208 of the Revised Edition of the Laws of Fiji, 1946) are as follows :—

14. The Director and any officers, servants, workmen and labourers employed by or under him may at all reasonable times and with all necessary and proper carriages, animals and other means search for, dig, cut, take and carry away any water, timber, brushwood, stone, gravel, clay or any other materials whatsoever for the purpose of tracing, measuring, making, working, opening, altering, turning, repairing, clearing, improving, fencing, building or excavating or in any way assisting in the tracing, measuring, making, working, opening, altering, turning, repairing, clearing, improving, fencing, building or excavating any public road or for the construction or repair of any lines or any building whatsoever required on or near any such public road for the use of any officers, servants, workmen, labourers, animals, carriages, persons or things employed in his service in and from any land adjacent or near to any such public road and may carry away the same through the ground of any person without being deemed a trespasser ;

Provided that no such materials shall be dug for, cut or taken away upon or from any yard, avenue to a house or lawn or any enclosed garden, plantation, field or wood without the consent of the owner thereof unless sufficient materials cannot conveniently be obtained from the neighbouring waste lands or bush or common or abandoned grounds, in which case the Director may take any of such materials where he can conveniently procure the same ;

Provided also that reasonable compensation for all materials so taken and for the damage done by the getting and carrying away the same shall be made to the owner thereof ;

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And provided further that the Director shall rail or fence off any quarries or pits from which any such materials shall be taken so that the same shall not be dangerous to any person or animal.

22. (1) Every person who sustains any loss or damage by reason of the exercise of any of the powers and authorities conferred by this Ordinance upon the Director shall be entitled to receive compensation for the same provided he makes application in writing in that behalf to the Director at any time before the expiration of three months after the act, matter or thing in respect of which such damage is alleged to have been done, and if he fails to make application within the aforesaid period his claim to compensation for the alleged injury may be disallowed ; 10

Provided that such application may be served by posting the same in a registered letter addressed to the Director at Suva, and such application shall contain particulars of the injury alleged to have been suffered.

(2) The amount of compensation, if the same cannot be agreed to, may be decided by arbitration, the Director naming one arbitrator and the person claiming compensation another. 20

(3) If the two arbitrators cannot agree they shall appoint an umpire, and the award of the arbitrators or umpire to be given in terms of the reference to be agreed to by the parties shall be final.

(4) In the event of one of the parties failing to nominate an arbitrator within three weeks from the date of the service of the aforesaid application, the arbitrator nominated may proceed to determine as sole arbitrator the matter referred to arbitration.

p. 23, 1.28-  
p. 24, 1.40

13.—The learned Judge's note of the argument on the 30th August, 1946, does not record the Appellant's argument on the first question at all. 30  
The argument was based on the assumption (which in the Appellant's submission was the only proper assumption) that Thomson J. was of opinion that a consideration of the two questions would help him to resolve the issues in the case. On the first question the Appellant submitted that the Court had no jurisdiction in the present proceedings to entertain or decide whether the taking of gravel from the bed of a stream infringes the rights of the public ; that the Respondent was not claiming damages for anything done to the stream bed but was founding his whole case on the allegation that the Director of Public Works had removed gravel from places which in law are not part of the bed of the stream ; that an action 40  
to restrain the Crown from infringing the rights of the public in the stream bed could only be brought by the Attorney-General or by a member of the public at the relation of the Attorney-General ; and that provided the Crown did nothing to interfere with the rights of the public, and subject to

well-known limitations, the Crown could do what it liked with property which the law said belonged to the Crown. On the question of compensation the Appellant explained that the point raised by the Court had not been taken because the Crown intended to pay reasonable compensation for gravel taken if the Court found that such gravel had in fact been taken from places outside the limits of the stream bed.

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- 14.—Thomson J. delivered Judgment on the 19th September, 1946. pp. 25-29  
He stated that for the purposes of this action Wainadoi Creek was admitted to be a stream, and set out under four headings the relief claimed by the Respondent. The first claim was for compensation for gravel removed and damages, but as all the gravel had admittedly been used on roads, Thomson J. held that the Roads Ordinance by Section 22 provided the only means of obtaining compensation and that as the Respondent had not availed himself of those means his claim for compensation and damages must fail. p. 25, l.26- p. 27, l.4
- 15.—The second claim was for a declaration that the Respondent is entitled to compensation. Thomson J. held that the Respondent was clearly precluded from obtaining such a declaration, but was not necessarily precluded from obtaining a declaration under the third claim that the deposits of gravel from which gravel had been removed are upon the Respondent's land. Thomson J. then stated that of the gravel taken some was taken from the bed of the creek, and some was taken from land which the Respondent alleged to lie outside the bed but which the Appellant alleged to be within the bed. Thomson J. construed Section 5 of the Rivers and Streams Ordinance as leaving in the Respondent so much of his freehold estate in the creek and its bed as it is not necessary to vest in the Crown for the assurance of public rights. Accordingly, Thomson J. thought that the Crown only had dominion over the gravel in the bed so far as necessary to maintain public enjoyment of the stream, and he therefore granted a declaration that the deposits of gravel in question are all on the Respondent's land subject to the Respondent's ownership of the bed being qualified by this limited right of the Crown. This view made it unnecessary for Thomson J. to consider the claim for a declaration that parts of the land in question do not form part of the bed. In dealing with costs, Thomson J. treated the action as substantially for compensation but referred to issues "which were not seriously contested in the early stages of the trial but were later argued at length at the request of the Court," in respect of which each side was made to bear its own costs. p. 27, ll.5-17 p.27, ll.17-48 p. 27, l.49- p. 28, l.4 p.28, ll.5-52; p. 31, l.30 p. 29, ll.1-15 p.29, ll.16-18 p.29, ll.19-26

- 16.—The Appellant submits that the concluding part of the Judgment shows that Thomson J. was treating his request for argument as raising new issues upon which throughout the hearing the parties had taken the same view—namely that in so far as the gravel had been taken from the bed of the creek the Respondent was not making and could not in law make any claim. The Appellant contends that the only way in which these

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 p. 31, l.10 new issues could properly have been raised was by amendment of the pleadings and of the issues thereon ; and any such amendment would have entitled both parties to lead evidence directed to showing the status of the creek, and whether or not it came within the terms of Section 2 of the Rivers and Streams Ordinance.

p. 31, l.37-  
 p. 32, l.24 17.—The Appellant further submits that if (contrary to the Appellant's contention) Thomson J. was entitled to consider fresh issues, Thomson J. misconstrued Section 5 of the Rivers and Streams Ordinance and should have held that it vests in the Crown the full ownership in the bed, qualified only by a statutory trust or obligation in favour of the public. The Appellant submits (amongst other criticisms of such a construction) that Sections 7, 8, 9 and 10 of the Ordinance negative the construction adopted by Thomson J. 10

p. 31, l.8 18.—The River and Streams Ordinance received the Royal Assent on the 11th March, 1882, and there was no material before the Court which entitled the Court to infer that there were then existing proprietary rights in streams in Fiji which remained except in so far as they were clearly taken away by the Ordinance, or to infer that any part of the title not vested in the Crown is vested in the present owner of the freehold. The Appellant submits that there is no presumption of fact or of law with regard to these matters, and that therefore the grounds upon which Thomson J. based his construction of Section 5 are unsound. 20

19.—The Appellant therefore submits that the declaration granted by the Supreme Court should be set aside and that the Respondent's actions should be dismissed with costs for the following amongst other

### REASONS.

1. BECAUSE the declaration made by the Supreme Court was based on the determination of a cause of action or issue not raised by the statement of complaint but expressly disclaimed by paragraph 10 thereof. 30
2. BECAUSE at no stage of the proceedings was the cause of action or issue upon which the declaration was based raised in the action nor were the parties given an opportunity to lead evidence relative thereto.
3. BECAUSE Sections 2 and 5 of the Rivers and Streams Ordinance clearly vest in the Crown the ownership of rivers and streams with the soil or bed under them.

4. BECAUSE the provisions of the Rivers and Streams Ordinance and in particular the sections setting out the rights of owners of land adjacent to rivers and streams, are inconsistent with the construction of Section 5 adopted by the Supreme Court, and support the construction for which the Appellant contends.
5. BECAUSE Thomson J. based his construction of Section 5 upon wrong inferences or unjustified presumptions concerning the ownership of the beds of streams before the passing of the Rivers and Streams Ordinance.

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CYRIL RADCLIFFE.  
FRANK GAHAN.

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CASE FOR THE APPELLANT

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