

warrant further inquiry in this case, and that the defendant's pleas upon the admitted facts are a full and complete answer to the case as put before the Court, and that the action must be accordingly dismissed. I allow costs; and, as the plaintiff represents himself as an official of the King of Samoa and only temporarily resident in Levuka, I think it right, in this case, that the attorney should be looked to for the amount in the first instance, leaving him to recover the same from his client. I allow 15*l.* 15*s.* in name of costs.

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Judgment for defendant with costs.

[APPELLATE JURISDICTION.]

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Prohibition Order—Western Pacific Order in Council, 1877, s. 25—

Naturalisation Act, 1870—Treaty between Great Britain and Samoa.

On an appeal to the Supreme Court of Fiji against an order of conviction for breach of a prohibition order made by the Deputy Commissioner in Samoa under the Western Pacific Order in Council, 1877, s. 25, on the ground that the defendant, a British subject, was naturalised as a Samoan and had ceased to be within the scope of the Order in Council,

Held, that notwithstanding anything contained in the Naturalisation Act, 1870, in the absence of any corresponding law in Samoa the defendant could not be naturalised as a Samoan and thereby be divested of his allegiance to Her Majesty, but must, as a British subject, remain subject to the provisions of the Order in Council.

Other technical objections to the validity of the conviction were overruled.

Mr. Hobday for the appellant.

The Acting Attorney-General (Mr. Solomon) for the respondent.

The facts and arguments sufficiently appear from the judgment.

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J. GORRIE, C.J. The question raised in this appeal relates to the administration of justice under the Western Pacific Order in Council, 1877. The appellant contests the right of the High Commissioner to apply to him the prohibition to be within certain limits of the Western Pacific as authorised by the Order in Council on the grounds that, although formerly a British subject, he had now become naturalised as a Samoan and had ceased to be within the scope of the Order; or, at all events, that if such contention could not be implied, then that the conviction by the Deputy Commissioner in Samoa was bad in law because of certain technical grounds which were pleaded by him. There were other grounds in his reasons of appeal, but they were directed against the prohibition order itself, against which it was not competent to appeal.

That part of the case which relates to naturalisation divides itself into two branches:—(1) Can a British subject become naturalised in Samoa? (2) If he can, has the appellant become so naturalised? At the date of the issue of the Order in Council, the Navigators' Islands—the geographical name of the Samoan Group—were included without qualification among those islands in which the High Commissioner's Court was to exercise jurisdiction over the British subjects sojourning therein; but the appellant contends that a significant change has since taken place in the position of Samoa as regards Great Britain, viz., that it has been recognised as a state by a treaty entered into between the Queen and the ruling power in Samoa, and, being so, it becomes such a state as those to which British subjects, under the Naturalisation Act, 1870, may transfer their allegiance. In that Act there is no definition of the foreign states to which allegiance may be transferred, and that

question is not likely to create difficulty in the vast majority of cases, as British citizens are not apt to be desirous to transfer their allegiance to any state except the established and recognised powers of the world. Here, however, in these seas we are dealing with communities of men little known to writers on the laws of nations, communities which are not and cannot be recognised as states, or—as in the case of Samoa—with communities of men which are on the borderland between unrecognised hordes and recognised states; and we have to determine, by whatever signs and attributes we can discover, whether Samoa is in such a condition that under the Act of Parliament we have cited a British subject may transfer to her his allegiance so as to cease to be amenable to the High Commissioner's Court. The point is not solved, as might at first sight be supposed, by the treaty itself, which contains a clause recognising the jurisdiction of the High Commissioner's Court over British subjects in Samoa. The contention of the appellant being that he had ceased to be a British subject, the fact that such a clause is in the treaty and that it seems to be one of the most important objects for which the treaty was negotiated is a strong argument that he could not transfer his allegiance; because where a community admits such a right it can scarcely be held to be a state in the sense in which the term is ordinarily used. But it is not conclusive. There is force in the contention of the appellant that nations, undoubtedly independent and which are recognised as states in the fullest manner, have conceded the jurisdiction to other nations to try the causes of their own subjects when resident within the bounds of those states. But if this important difference in the relations between Great Britain

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and Samoa—as contrasted with her position as regards civilised powers—is not sufficient to determine the point, to what other test are we to turn? The doctrine of imperial Rome was that a state was such an organised body politic as Rome could declare formal and public war against in the event of a *casus belli* having arisen. All other bodies of men it treated in true imperial style—as thieves and robbers—the residuum of the community of nations which have no recognised rights. By this test we fear the contention of the appellant would fail. We can scarcely imagine Great Britain declaring a formal and public war against Samoa; while, on the contrary, we have more than once in recent years seen force used to her by captains of men-of-war or by the High Commissioner as Consul-General, just as now practised in the islands admittedly savage.

Turning to the definition of a state as given by Phillimore, vol. i., s. 63, we still find it difficult to give a full acceptance to the proposition of the appellant. “A state,” says that learned jurist, “may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising through the medium of an organised government independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other communities of the globe.” If the expression “exercising through the medium of an organised government independent sovereignty and control over all persons and things within its boundaries” had been omitted from this definition, or if the words had been qualified by a reservation applicable to such as were exempted from the control by special treaty, it would not have

been at all inapplicable to Samoa. The Samoan people, who are clearly distinguishable from other tribes and people in the adjacent islands, permanently occupy a fixed territory, and they are bound together by common laws, habits, and customs into one body politic; they are capable of making war and peace—not indeed that Samoa is able to enter into contests with the Great Powers of the world but with communities of the same calibre as herself—and that she is capable of entering into international relations with the powers of the world, the treaties with Great Britain, Germany and the United States have demonstrated.

Here then we have something very nearly, if not altogether, approaching to the dignity of such a community as would be universally recognised as a state. The sole exception is that she does not exercise sovereignty and control over foreign subjects within her territory. They do not *de facto* submit to her laws; and consequently another species of jurisdiction has been provided for British subjects, both to determine their civil rights and to punish crimes and offences committed by them. If the appellant, Hunt, who may wish to abjure his country, not for any unlawful reasons, but solely from an ambition to manipulate the native chiefs as other adventurers have done elsewhere, is able to denationalise himself, other subjects may do the same whose sole reason would be not to place themselves under Samoan law but to escape from the control of British authority.

While recognising the possibility of such a result, the appellant quoted the case of the Sandwich Islands as a state where both British and American subjects had become naturalised, and where the trusted advisers of the Chief or King, who, under the tutelage of such

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adventurous naturalised subjects, had been doing the tour of Europe and was received with distinction in the great capitals. I fear the example quoted is not a very happy one of the good effects likely to follow from permitting adventurers, uncontrolled by the authorities of their own country, to have free course for their ambitious designs and crude theories in non-civilised countries. For while some may be able to do good, the majority do nothing but evil, chiefly from their insensate desire to overturn in a few brief years the habits and customs of a race. The visit of the King of the Sandwich Islands to Europe was to look for a population, just as we know from what is passing under our own eyes that he is endeavouring to recruit population from the other islands of the Pacific to replace his own people who are fast perishing. But the case is undoubtedly one in point for the appellant in this case. He may say that he is entitled to his legal rights whether the result of giving him these would be beneficial or the reverse to the Samoan people. And, indeed, I think we may find in this case of the Sandwich Islands something which will be a better test to aid in the decision of the cause than any abstract definition of a state which it is so difficult to apply to a community not anciently recognised as such, and which at its first entrance into international relations with our own country abandons jurisdiction over British subjects sojourning in its territory.

To prove that the Sandwich Islands did claim and exercise the right to receive the subjects of other nations as naturalised subjects of these territories the civil code of the state was quoted and referred to. This shows, what indeed is obvious, that in all organised states such an important step as naturalisa-

tion must be recognised, ordained, and controlled by laws. If the nations which maintain relations of amity and intercourse with the community enacting such a law make no protest against it, but accept it as part of the organic law of the community, that of itself is a sufficient recognition of the right. Has any such law been made by the King and Government of Samoa—the “Maló” referred to as being a party to the treaty? If it had, it must, from the relations of Samoa with the three Governments already named, have been the subject of discussion not only of the representatives of the Great Powers with Samoa but among those powers themselves. No such law has been quoted to me, nor has the existence of any such law been alleged. All that has been produced by the appellant in the case is an oath of allegiance, said to have been taken by him, to the King of Samoa, to which he added “and I will certainly cast off and put away and not obey the rule of Her Majesty Victoria the Queen of England.” There is nothing to show that the taking of this oath was an act of the Government of Samoa or recognised by them. It was simply, so far as shown, a personal act of the Chief or King to whom the appellant was then secretary; there is still less to show that what was then done was in conformity with a law duly discussed and adopted by the authorities of Samoa. If the appellant contends that the King had power to receive him in this manner as a Samoan, without any law or because there was no law, then what one king can do another may undo. The oath was sworn to and accepted by Malietoa I. (called Talavou), but Malietoa II., as proved in the proceedings, has determined to have nothing to do with the appellant. His father, he said, had trouble about Hunt. He thought his own comfort in his government to be worth

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more to him than the advancement of the ambitious schemes of a foreigner. It is quite clear that Hunt cannot be regarded as a Samoan if there is no law to make him one and the ruling chief or authority repudiates him.

I cannot come to any other conclusion, therefore, than this, that whatever right Hunt may have under the Naturalisation Act to become a naturalised citizen of Samoa, there is yet no corresponding law in Samoa authorising the naturalisation of foreigners, and as a question of fact that the so-called personal acceptance by Malietoa I. of Hunt as a Samoan has been undone by Malietoa II., who will have none of him.

On the first ground of this appeal, therefore, my judgment is against the appellant.

But then the appellant contends that if he be not a Samoan, but a British subject, and under the jurisdiction of the High Commissioner's Court, he has been wrongfully convicted by the Deputy Commissioner in Samoa. The charge against the appellant was that he had committed an offence against the Order in Council by residing or being in Samoa in contravention of the order of prohibition issued against him on the 28th of August, 1880, by the High Commissioner. And the Court convicted him, as it had a right to do, of the charge made against him and sentenced him "to three months' imprisonment or until such time, not exceeding three months, as opportunity shall offer for sending him in custody to Levuka under the warrant issued by the High Commissioner."

The appellant contends that his conviction ought not to have been an alternative one, and for this reason it is bad. The conviction might perhaps have been differently expressed if drawn by a magistrate experienced

in the technical rules of convictions, although it cannot be fairly described as an alternative punishment. The punishment was to cease on the occurrence of a certain event, and it was in no case to exceed three months. The Deputy Commissioner endeavoured to express what he intended to do—in what may be called his executive capacity—with his legal sentence. He gave a sentence of three months' imprisonment, which was perfectly legal and competent; but in his own mind he had evidently resolved that as the main object after all was to prevent Hunt from troubling the peace of Samoa, to give him the benefit of the milder course if an opportunity occurred to enforce the prohibition itself, in place of continuing the punishment of the appellant for having defied it; and he humanely endeavoured to express this intention in the conviction, which it was difficult to do without giving an opening for such an objection as has been made. In point of fact an opportunity did occur, the appellant was removed from Samoa under the High Commissioner's warrant, and on reaching Levuka was set at liberty. He now appeals—not because he is kept in prison under a conviction which is bad from informality—but, having got out because of the occurrence of the event named in the conviction, he now appeals against that which was in his own favour and by which he has benefited. If I alter the conviction, as I may do under the powers conferred by the Order, so as to strike out the words which the Deputy Commissioner inserted as indicative of his intention but which he need not have inserted, and thus leave the conviction to the bare sentence of three months' imprisonment, I would perhaps have to consider whether I ought to give orders for its enforcement.

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On the whole, I am not disposed to disturb the conviction as it stands. The expression of the intention of the Deputy Commissioner was so limited that the appellant could not have been detained beyond the three months; and as he has gained the advantage of being sooner restored to liberty because of the words which were inserted, I certainly should not quash the conviction simply on that ground, and do not feel myself called upon to alter it in a way which would leave it on record as a sentence against the appellant which he has not fulfilled.

Appeal dismissed.

April 15.

[CIVIL JURISDICTION.]

JOSKE v. HUON.

Crown Grant—Lands Commission—Breach of Contract for Sale of Land—Measure of Damages.

In an action for damages for breach of contract to sell certain land for which defendant had accepted the price, but which the Lands Commission determined he had no title or authority to dispose of, no fraud being suggested,

Held, following the rules of English law upon the subject, that the measure of damages was not the loss of any benefit the plaintiff might have obtained on a resale from the enhanced value of the land, but must be limited to putting him in the same condition in which he was before the contract was made together with any costs he might have been put to by the defendant selling him land to which he could give no title.

Quære, whether such rules would apply where the title to the land is under "The Real Property Ordinance 1876."

Mr. Garrick for the plaintiff.

Mr. Hobday for the defendant.

The facts of the case are sufficiently stated in the judgment.

SIR JOHN GORRIE, C.J. The plaintiff in this action sues the defendant for damages on the ground that "the defendant agreed to sell to the plaintiff certain land at Suva, and the defendant failed and refused to complete his said agreement, whereby the plaintiff lost great gains and profits which he would have received had the defendant completed his agreement." The damages are laid at 5,000L., and are said to be made up of the costs to which the plaintiff was put, and by the difference of price of the land between the purchase by the plaintiff and the breach of contract.

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The statement of claim sets forth that when the plaintiff applied for a Crown grant of the land sold to him by the defendant, the defendant's father also applied for a Crown grant for the same land; and that before the Commission appointed to investigate into such claims the defendant gave evidence that, in selling the land to the plaintiff, he had acted without authority and that the land truly belonged to his father. The land was in consequence not allowed to the plaintiff by the Governor in Council, and this decision was confirmed by the Board for rehearing such claims established by Ordinance XXV. of 1879. The defendant asserts that both claims were disallowed and the land granted to his father, *ex gratia*, because of his occupation. It cannot be doubted, however, that the allowance took this particular shape, not from any matter or thing in relation to the question between the contending parties, but because of the land having formed part of a vast claim preferred by a company known as the Polynesia Company, which had been disallowed, while allowing the claims of those sub-purchasers who had occupied and improved the land. The particular form of the grant may, therefore, be dismissed from further consideration. The defendant at

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the hearing did not dispute the main facts upon which the plaintiff founds, viz., that he did sell to the plaintiff 80 acres of land for a price received by him, and that his father has been preferred to the plaintiff as the rightful claimant. The question at issue, therefore, may be taken to be one of law as to whether damages are due on a contract of sale of land first made and then not carried out by the defendant in the peculiar circumstances about to be set forth.

In the year 1872 or thereabouts the defendant's father, Amy Augustus Huon, came to Fiji from Melbourne, and bought from the Polynesia Company a block of 40 acres of land, with a frontage to Nabukalou Creek, which flows into the harbour of Suva. A Mr. William Burd Evans, who accompanied him, bought an adjoining block of 40 acres. Evans, having no money to cultivate, borrowed 400*l.* from Amy Augustus Huon, for which a mortgage was made out in formal manner by an attorney of the name of Freeman, then residing in Levuka, but the deed was not signed at the time. Of even date with the mortgage a formal conveyance of the land or the equity of redemption was also made out in Huon's favour, describing it as an undivided half of a block of 80 acres; but that deed also remained unsigned. Huon then left for San Francisco, leaving behind him his son Charles Huon, the defendant. He dealt with the 40 acres belonging to his father as his own, and let them to Mr. Joske, the plaintiff, for a small rent. Thereafter Evans, in his turn, proposed to quit the Colony; and, before he went, he wrote out a paper assigning to Huon, the son, all his interest in the 40 acres which originally belonged to him, and to which the unsigned mortgage and conveyance related. Huon, the son, thereupon dealt with this land also as his own, and, having

suffered a loss by a venture in *bêche-de-mer* shipped to Melbourne, he ultimately sold the whole 80 acres to Mr. Joske, the plaintiff, or his wife, for an advance to discharge a bill drawn against the *bêche-de-mer*. Charles Huon, the son, says he thinks he got 15*l.* over and above 4*8l.*, which was the amount of the dishonoured bill paid by Mrs. Joske.

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The sale-note by Huon, the son, is not forthcoming, but its contents have been proved by witnesses who saw it during the proceedings about to be mentioned. It was made some time in 1875, a letter written by the defendant on 24th December, 1875, referring to the sale as a past transaction. There seems to be no doubt that the land was bought for a fair enough value at the time, the question of Suva as the site for the capital not having then been brought into prominence. Mr. Huon, the son, stated in his evidence that he did not expect to see his father back, or that he would interfere with what he had done in regard to the property. The transaction, therefore, appears to have been perfectly fair and straightforward on both sides.

On the organisation of the Commission to inquire into the land titles of the Colony previous to the issue of Crown grants to those settlers who had *bond fide* acquired them from the natives, claims were put in both by Mr. Joske and by Mr. Huon, the father, for the above 80 acres. The latter had returned from California in 1877, and repudiated what his son had done in regard to the land. Mr. Huon, the son, was annoyed at the position his father had taken up, and wrote to Mrs. Joske a letter, expressing his regret.

The claims were investigated before the Lands Commission, at Suva, in the beginning of 1878,

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when Mr. Huon, the son, gave evidence that he had sold the land outright to Mr. Joske, that he had done all his father's business before he went to San Francisco, but that he had got no written or special authority in regard to the land. He stated that he had sold the land for his own purposes, as he thought his father would not come back and would have no objection to his doing so. The Governor in Council, upon the evidence taken before the Commissioner, allowed the land to Mr. Huon senior, on the ground of occupation. From this decision Mr. Joske appealed in regard to the 40 acres originally acquired by Evans, believing, as he stated in his petition, that the assignment or conveyance from Evans had been overlooked. This document was believed also to have been lost, and evidence was taken in regard to its contents; but all the while it was among the papers, and is so now, being attached to an affidavit in which Mr. T. B. Mathews swears to the signature as being that of Evans. But the Court for rehearing refused the application, no doubt having taken the mortgage and conveyance by Evans to Huon, the father, which had by that time been duly signed by Evans, as more correctly representing what had actually been done and intended by the parties at the date than the paper by which Evans assigned to Huon, the son, whatever interest he might have had in the land at the period of his own departure.

In these circumstances, the plaintiff has brought his action of damages against Huon, the son, for his breach of contract in not handing over with a good title the land he had professed to sell. Land in the neighbourhood of Suva has enormously increased in value since the date of the transaction in consequence of the town having been declared the capital of the Colony, and the

position of the 80 acres in question is exceptionally favourable in regard to the port.

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We now come to the important question—how stands the law in regard to sales of real property where the vendor is unable to give a title or carry out his contract? The plaintiff relies upon the case of *Engel v. Fitch* decided in the Exchequer Chamber, on appeal from the Court of Queen's Bench (1), and *Godwin v. Francis*. (2) But neither of the learned counsel at the hearing referred to the circumstance that the whole law upon the subject came under the review of the House of Lords at a later period, in the case of *Bain v. Fothergill* (3), when, after taking the opinion of the judges, their Lordships gave a decision which must now be regarded as authoritatively fixing the law of England on the point. The whole of the previous decisions, including those upon which the plaintiff relies, were passed in review and commented on. Even late editions of the text-books which we ordinarily use have been published before this decision, and it requires portions of those text-books to be rewritten. In Mayne's *Treatise on Damages*, e.g., the edition of 1872 contains a note softening down somewhat the doctrine of the text upon the strength of *Bain v. Fothergill*. But that was simply upon the decision in the Court of Exchequer, the edition having been issued before the decision in the House of Lords had been given,—which would have required the principles then enunciated and set forth in the note to be much more prominently stated in the text as now the recognised law in cases of damages on sales of real estate. The law of England upon these questions had been based, for a very long period, upon the case of *Flureau v. Thornhill* (4)

(1) L. R. 4 Q. B. 659.

(3) L. R. 7 H. L. 158.

(2) L. R. 5 C. P. 295.

(4) 2 W.B.L. 1078.

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decided nearly a hundred years ago. The decision in that early case had never been overruled or contradicted, but, just as it might be regarded as establishing of itself the exception to the common law rule of damages being due where a contract had been broken, so in process of time certain decisions and certain *dicta* of eminent judges were regarded by some of the profession as having established an exception upon the exception, and reduced the rule laid down in *Flureau v. Thornhill* purely to the case where the vendor could not give title because of some legal defect in his own title which had been discovered in course of the investigation caused by the sale. The leading authority on which this latter view was based was *Hopkins v. Grazebrook* (1), which, if it had been sustained, would certainly have been more favourable to the plaintiff's case here than *Flureau v. Thornhill*. The case of *Engel v. Fitch*, on which the plaintiff relied, was decided by the Exchequer Chamber on the assumption that the case of *Hopkins v. Grazebrook* was good law and ought to be followed; but the House of Lords, in the carefully considered case of *Bain v. Fothergill* to which I have referred, ruled that the decision in *Hopkins v. Grazebrook* could not be supported, and thus the foundation of all the subsequent cases of *Robinson v. Harman* (2), *Engel v. Fitch*, and others having been removed, they must all now be tested with great care and taken in subordination to the higher authority of the later decision. The law as laid down by the House of Lords accordingly emphatically reasserted the principle of *Flureau v. Thornhill*, and overruled the authority of *Hopkins v. Grazebrook*. The principle of the former may be summed up from the form of question put to the judges,

(1) 6 B. & C. 31.

(2) 1 Exch. 550.

as this—that, upon a contract for the sale of real estate, where the vendor without his default is unable to make a good title, the purchaser is by law not entitled to recover damages for the loss of his bargain, but only the reimbursement of his costs.

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Such being the law of England upon the general question, is there anything in the peculiar position of this Colony, or in the circumstances of this particular case, to induce the Court by considerations of justice to depart from the ruling of the law as thus laid down, or to modify it so as to adjust it to that position and those circumstances? The reason for the decision in *Flureau v. Thornhill* was that in dealings in the purchase and sale of real estate it is recognised in England by both parties to the transaction that in consequence of the complications of the law there must be some degree of uncertainty as to whether a good title can be given by the vendor; and, the purchaser taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating the matter. A contract for a sale of real estate is in England held to be very different indeed from a contract for a sale of a chattel, where the vendor must know what his right to the chattel is; whereas, from the condition of the law as to real property, a vendor may very well not know whether he can give a good title or not.

But the law regarding the titles and mode of transfer of real property is in this Colony, since the passing of "The Real Property Ordinance 1876," essentially different from that of England. There need be no

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uncertainty here as to the owner or the property owned; indeed, by the wholesome condition of our colonial law a vendor of real estate may know absolutely what he is selling, and whether he be the lawful owner of it, as much as if he were dealing with personal estate. Such a consideration cannot fail to enter very largely into the decision of any cause of this nature where the title is one under the Real Property Ordinance, and, should such a case arise, it will undoubtedly be the duty of the judge to consider most fully under the whole circumstances of the real property law of this Colony whether the principles laid down in *Flureau v. Thornhill*, reaffirmed as it has been so lately as 1874 by the highest court of the realm, are applicable here. But, so far as regards the present case, the contract and the alleged breach of contract arose before the Real Property Ordinance could come into operation in regard to the property. The procedure before the Lands Commission was taken for the purpose of ascertaining whether the plaintiff or defendant's father was entitled to that Crown grant which is the foundation of all the regular titles in the Colony.

Therefore, what we have to consider is whether the principles of the decision of *Flureau v. Thornhill* are applicable to that transition state of the law of real property in the Colony between annexation, on the organisation of the Colony in 1875, and the granting of Crown grants so as to bring real estate under the operation of the law of 1876. Now, there can be no doubt that before the investigation of the Commissioners and the decision of the Governor in Council thereupon, or the final rehearing before the Board appointed for the purpose, the defendant could not tell whether his title would be sustained or not. There was, first of all, the underlying question

whether the land had been originally *bond fide* acquired from the natives. There was, next, in the case of these Suva lands, the question whether Her Majesty's Government would recognise the transactions of Cakobau with the Polynesia Company; and then, behind that, what course would be followed in regard to those sub-purchasers from the Polynesia Company who had occupied their lands and settled in the Colony. If ever, therefore, the assumed owner of real estate might have been without any default of his own, in ignorance of the exact state of his title, it was here in this Colony before the investigations of the Lands Commission were concluded. The conditions, indeed, were very different from those which rendered the principles of *Flureau v. Thornhill* in accordance with justice in England; but, although the conditions of society were so different, the result upon the certainty of the title to real estate was so similar—indeed, in this Colony the uncertainty of title was at the time so much greater—that I have no doubt the principles of that decision may be, and ought to be, applied here to cases arising in that transition period.

Again, let us test the question by the principle of the decision of *Engel v. Fitch*, upon which the plaintiff mainly relies. Both in the Queen's Bench and the Exchequer Chamber the case was decided upon the ground that the breach of contract had arisen from the neglect of the defendant to do an act within his power to complete the title, or, rather, to give possession, and not from inability to make a good title. Where a vendor so acts it could not be justly said that the difficulty about title had arisen "without default" of the vendor. But what is the case here? The difficulties about the title did not arise from any act of the defendant, who honestly believed he had the

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right to sell, but have arisen from the measures ordered by the Crown to be taken at the organisation of the Colony for the purpose mainly of removing from the path of the colonists in future the difficulties and discouragements regarding real estate which have so seriously affected industry and enterprise at home. The investigation before the Lands Commission was no act of the defendant; the decisions of the Governor in Council and the Board for rehearing could not be controlled by him; and, so far as they could be affected by any evidence he could give, the defendant did not falsify or seek to hide that he had sold to the plaintiff in the full conviction that he had control over the lands he sold. Nay, it must be observed, further, that the defendant did not claim the lands before the Commission. He was not the litigant, but his father; and by no possibility could any principle deducible from the case of *Engel v. Fitch* be found to apply where the vendor was not the party holding the property, but where another litigant had come in and challenged the decision of the competent court upon the vendor's right to convey. The plaintiff, it is true, in his argument upon the *quantum* of damages to which he was entitled, attempted to show that, whether the defendant claimed or his father, the former, from the father's age and in the course of nature, would be the ultimate gainer. A court cannot take into account, in the decision of a cause of to-day, all the contingencies and probabilities of the future. There is no proof, and no ground for believing, that the father in claiming the property as his own was acting in collusion with the son for the purpose of obtaining in this clandestine manner the contract set aside; on the contrary, while the son seemed to have been from the first disposed to stand by his bargain, the father dis-

approved of his act of sale, and claimed the property as his own as having been alienated without his authority. The plaintiff must equally have felt this, for he did not even bring the whole case before the Board for rehearing. He limited himself to the 40 acres acquired from Evans, and did not further contest the 40 acres which had been the land of Huon senior.

Accordingly, I hold that the plaintiff's claim for damages for the loss of the benefit of his bargain must be set aside. He is, however, clearly entitled by all the authorities to be placed in the condition he was in before the contract as regards any sums out of pocket and any costs to which he has been put because of the defendant's act in selling land to which he can give no title. The defendant has made no tender, but he cannot keep in his pocket the sum he received for the land which he cannot convey. He must repay the sum; and, as the amount he himself stated in his evidence was rather larger than that mentioned by the plaintiff, I will fix it at the $15\text{£} + 48\text{£} = 63\text{£}$, admitted by defendant, with interest at 10 per cent. from the 30th of March, 1875, which, in the absence of the note of sale, I take as the date of the transaction for the purposes of computation. The plaintiff is also entitled to his costs of claiming the land before the Lands Commission and the Board for rehearing, as the same shall be taxed. As to the costs of this suit, the substantial object of the plaintiff was to obtain damages—heavy damages—for the loss of the benefit of his bargain, and on that he has failed, so that I cannot give him costs, although he recovers a certain amount against his adversary; nor, on the other hand, do I feel it to be just to give costs to the defendant in a case which has arisen from his own rash act in selling his father's land without authority, and causing so much

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trouble and heart-burning, and where, after all, if he is spared the infliction of heavy damages, he must still pay certain sums as a penalty for the failure to complete his bargain. Each party will accordingly bear his own costs.

Judgment for plaintiff without costs.

Oct. 25.

[CIVIL JURISDICTION.]

EVERETT v. THE ATTORNEY-GENERAL.

Crown Grant—Land Claim—Representation of Native owners at the Hearing—Practice—Costs.

In an action against the Colonial Government for refusal to issue to the plaintiff a Crown grant which had been signed by the Governor and registered, but which was resisted by the defendant on the ground that it had been signed and registered in error, it appearing that the native owners of the land, the subject of the Crown grant, had interests in it conflicting with those of the plaintiff, the Court ordered that they should be represented by counsel at the hearing. The Attorney-General, who was counsel for the Crown, thereupon put in a *pro forma* statement on their behalf, simply accepting the pleadings of the Crown.

Held, that this was not sufficient, and that the Native Department should see that the interests of the native owners were properly and separately represented by counsel.

The defendant was ordered to pay the plaintiff's costs occasioned by the delay.

Mr. Thomas for the plaintiff.

The Attorney-General (Mr. Fielding Clarke) for the defendant.

The facts of the case appear sufficiently from the judgment.