

KULAMMA

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v.

MANADAN

[SUPREME COURT* 1964 (Mills-Owens C.J.), 6th August-7th
October, 9th December]

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Civil Jurisdiction

Native land—lease by Fijian owners to Crown for 99 years—agreement to lease to tenant by Native Land Trust Board pursuant to informal arrangement with Crown—land primarily native land and native land for the purpose of the Native Land Trust Ordinance—Law of Property Act 1925 (Imperial) (15 Geo.5, c.66) s.136(1)—Supreme Court of Judicature Act 1873 (Imperial) (36 & 37 Vict., c.66) s.25(6)—Native Land Trust Ordinance (Cap. 104) s.12(1)(2)—Native Lands Ordinance (Cap. 103)—Crown Lands Ordinance (Cap. 138)—Land (Transfer and Registration) Ordinance (Cap. 136) s.9.

C

Native land—illegality—dealing without consent of Native Land Trust Board—Native Land Trust Ordinance (Cap. 104) s.12(1)(2).

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Contract—consideration—antecedent debt—implication of forbearance to enforce. Contract—illegality—parties in pari delicto—no entitlement to recovery of sums paid or credited to defendant prior to action.

One Sabhapati was the tenant of sugar-cane Farm No. 581, at Saweni, from the Colonial Sugar Refining Co. Ltd. In 1957 he entered into a "share-farming" agreement with his brother the defendant, under which the latter would cultivate the farm, and the net proceeds, which were to be shared equally, were to be paid to the parties' solicitors. The agreement was acted upon until Sabhapati's death in 1958 and thereafter the plaintiff (who is Sabhapati's widow and personal representative) and the defendant, continued to act thereunder. The plaintiff and her family from November 1960 resided with the defendant. In November 1960, at which time there was a sum of money due to the defendant under the agreement, the plaintiff executed an assignment, purporting to assign to the defendant all sugar cane crops growing or to be grown on Farm 581 and all money payable or thereafter payable in respect of the crops. Disputes having arisen the plaintiff brought these proceedings claiming that the assignment of 1960 was invalid as having been given for a past consideration, or an illegal consideration in that the share-farming agreement was claimed to be an illegal dealing in native land, contrary to section 12 of the Native Land Trust Ordinance, the consent required by that section not having been obtained.

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The land of which Farm 581 was part, was found by the Native Land Commission, acting under the Native Lands Ordinance in 1914, to be owned by a Fijian proprietary unit, and had been leased, on

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* Appeal No. 4 of 1965 from this judgment to the Fiji Court of Appeal will be reported in a later volume. — Ed.

behalf of the Fijian owners to the Crown for ninety-nine years from the 1st January, 1900. In 1940 the Native Land Trust Board was established under the Native Land Trust Ordinance, and entrusted with power to grant leases of native land. By informal arrangement with the Commissioner of Lands the Board took over administration of the block of land in question and agreed to grant to the Colonial Sugar Refining Co. Ltd. a lease of the land of which Farm 581 was part. The lease to the Crown was to be surrendered as part of the arrangement but no actual surrender had been executed.

A **B** *Held:* 1. The assignment was given as security and extended to the existing debt and future expenditure. There was therefore present consideration. Even on the assumption that the only consideration was the antecedent debt — (i) if the assignment vested an interest in the crops or the proceeds of sale thereof in the defendant it was immaterial whether or not there was consideration, and (ii) if it was purely contractual forbearance by the defendant to enforce payment would be implied from the circumstances.

C 2. The division between native land and Crown land contemplated by the Native Lands Ordinance and the Native Land Trust Ordinance is between land which is primarily native land and land which is primarily Crown land and the main purpose of the former Ordinance was to ascertain which category lands fell into.

D 3. Under the Native Land Trust Ordinance the land in question was native land.

E 4. The arrangement with the Crown permitted the grant of leases by the Native Land Trust Board taking effect in possession, and the statutory provisions presented no obstacle to its so doing. Therefore the restrictions in section 12 of the Native Land Trust Ordinance were applicable.

5. The share-farming agreement was a "dealing" within the meaning of section 12 of the Native Land Trust Ordinance; at the least the defendant was a licensee of the land with an interest.

F 6. The assignment was tainted with illegality as a document collateral to the share-farming agreement.

7. The plaintiff was entitled to a declaration that the assignment was void for illegality, to which the plaintiff was a party, with respect to the sum of £349-3-11 held by the Colonial Sugar Refining Co. Ltd.

G Native Land Trust Ordinance s. 12: (1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

H Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the 29th day of September, 1948, to mortgage such lease.

(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee.

and to any proceeds not paid over to or credited to the defendant in the accounts, prior to the commencement of the action.

Cases referred to: *Bhagwat Prasad v. Jayantilal* (Civil Appeal No. 2 of 1964 — unreported): *Alliance Bank v. Broom* (1864) 34 L.J. Ch. 256; 11 L.T. 332: *Fullerton v. Provincial Bank of Ireland* [1903] A.C. 309; 72 L.J.P.C. 79: *Glegg v. Bromley* [1912] 3 K.B. 474; 106 L.T. 825: *Wigan v. English & Scottish Law Life Assurance Association* [1909] 1 Ch. 291; 100 L.T. 34: *Bob Guinness Ltd. v. Salomonsen* [1948] 2 K.B. 42; 64 T.L.R. 306: *In re McArdle* [1951] 1 All E.R. 905; [1951] Ch. 669: *Subamma v. Aziz & Sons* (1958) 6 F.L.R. 109: *Earle (G. & T.)* (1925) Ltd. v. *Hemsworth R.D.C.* (1928) 140 L.T. 69; 44 T.L.R. 758: *Petch v. Tutin* (1846) 15 M. & W. 110; 153 E.R. 782: *Scott Doering, McNab & Co. v. Brown* [1892] 2 Q.B. 724; 67 L.T. 782: *Berg v. Sadler & Moore* [1937] 1 All E.R. 637; [1937] 2 K.B. 158: *Ramlingham v. Ramkrishna Mission (President)* (1963) 9 F.L.R. 95: *Harnam Singh v. Jamal Pirbhai* [1951] A.C. 688: *Lyle-Meller v. Lewis (A.) & Co. (Westminster), Ltd.* [1956] 1 All E.R. 247; 100 Sol. Jo. 13: *Stratford v. Syrett* [1957] 3 All E.R. 363; [1958] 1 Q.B. 107: *Stone (J. & F.) Lighting & Radio Ltd. v. Levitt* [1946] 2 All E.R. 653; [1947] A.C. 209: *Rhyl U.D.C. v. Rhyl Amusements Ltd.* [1959] 1 All E.R. 257; 103 Sol. Jo. 327: *Howell v. Falmouth Boat Construction Co.* [1951] 2 All E.R. 278; [1951] A.C. 837: *Fisher v. Bridges* (1853) 22 L.J.Q.B. 270; on appeal (1854) 23 L.J.Q.B. 276; 118 E.R. 1283: *Pickering v. Ilfracombe Railway Co.* (1868) L.R. 3 C.P. 235; 17 L.T. 650: *Re Burdett, Ex parte Byrne* (1888) 20 Q.B.D. 310; 58 L.T. 708: *In re North Wales Produce & Supply Society, Ltd.* [1922] 2 Ch. 340; 127 L.T. 288.

Action for declaration that an assignment of cane proceeds was invalid by reason of illegality or absence of consideration.

S. M. Koya for the plaintiff.

K. A. Stuart for the defendant.

The facts appear from the judgment of the Chief Justice.

MILLS-OWENS C.J.: [9th December, 1964]—

The Plaintiff is the widow and personal representative of Sabhapati who died in November, 1958. At the date of his death Sabhapati was tenant of a sugar-cane farm known as Farm No. 581 Saweni, Lautoka, comprising approximately 10 acres. He held the farm as tenant of the Colonial Sugar Refining Co. Ltd. (the C.S.R. Co.). The tenancy, it is agreed, is now vested in the Plaintiff. The Defendant is the brother of Sabhapati deceased. On the 23rd May, 1957, Sabhapati and the Defendant entered into a "Share-Farming Agreement" [Exhibit B], under the terms of which the Defendant was to cultivate the farm, bearing equally with Sabhapati the expenses of cultivation and sharing equally with him the net proceeds; the crops were to be sold to the C.S.R. Co. and the proceeds paid into an account to be kept by the parties' solicitors; Sabhapati's half-share was to be applied towards discharge of a debt owed by him to one Murtuza and the Agreement was to enure until that debt was discharged;

thereupon Sabhapati was to use his best endeavours to obtain the consent of the C.S.R. Co. as landlord to a transfer of a one-half interest in the tenancy to the Defendant.

- A Sabhapati and the Defendant acted under the Agreement until the former's death in 1958. Following his death the Plaintiff and the Defendant continued to act under the Agreement. That state of affairs continued until shortly before the present proceedings were commenced in October, 1963, when disputes arose between them as to the state of the accounts and the Defendant ceased to cultivate the farm. In the meantime, that is to say in November, 1960, the Plaintiff together with her children had gone to live in the Defendant's household at his own farm. In the same month, whilst residing there, she executed, under hand, an Assignment [Exhibit C] purporting to assign to the Defendant all sugar-cane crops then growing, or thereafter to be grown, on Farm No. 581 and all moneys payable or thereafter to become payable in respect of such crops. The Defendant signed an endorsement authorising the C.S.R. Co. to pay the moneys to the solicitors. The Assignment bears an acknowledgement of sight by the Company. The Plaintiff and her children continued to reside in the Defendant's household for a period of about 2 years following the Assignment. Throughout the whole of the relevant period accounts were maintained by the solicitors, but copies were not supplied to the Plaintiff until shortly before the trial, although the writ claimed an account. Certain of the earlier accounts had however been presented and explained to her at the solicitors' office prior to the proceedings and acknowledged by her as correct.
- E The Plaintiff became convinced that she was being cheated by the Defendant, particularly as to the amount due to him at the date of Sabhapati's death. There was then due to the Defendant, it is agreed, a sum of £189.2.9 in respect of his one-half share of the proceeds of crops under the Share-Farming Agreement [see the Account Exhibit D.]. According to the Plaintiff's case that was the only amount due to the Defendant at the date of the Assignment. Clearly, on the evidence, this was only part of the story. [Here is should be interpolated that the accounts remain to be investigated, as Counsel for the parties agreed at the trial that the legal issues involved should first be determined; I must however deal broadly with the accounts, leaving the details for subsequent investigation or, possibly, agreement]. The Plaintiff professed to be almost completely ignorant of her late husband's affairs and of events following his death. I can place no reliance on her evidence. It is abundantly clear that following Sabhapati's death the Defendant not only cleared off the balance due to Murtuza but also paid other sundry creditors of Sabhapati's estate and that he, the Defendant, also bore the expenses incurred in the subsequent cultivation of the farm. I am satisfied that all this was done with the Plaintiff's knowledge and concurrence. Thus an account [Exhibit F] shews that at the date of the Assignment (November, 1960) the Plaintiff had become indebted to the Defendant in the sum of £780.0.4 (inclusive of the £189.2.9, and subject, as I have said, to verification of the details). Although the Plaintiff denied it,
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I am satisfied she was a party to an attempt to procure the Company's consent to the Defendant becoming a tenant in common of the farm, as was contemplated by the Share-Farming Agreement. The Plaintiff alleges that she was induced to sign the Assignment on the faith of a fraudulent misrepresentation by the Defendant that the sum owed to the Defendant by the estate of Sabhapati at the date of his death was £800, whereas, as it is alleged, in truth and in fact the amount owing was the £189.2.9 only. No doubt the '£800' is the sum of £780.0.4. shewn in the account Exhibit F. It is evident, in my view, that the Plaintiff thought fit to shut her eyes to all except the £189.2.9. There are no grounds whatsoever to support the allegation of misrepresentation. Then, following the Assignment, as is common ground, the Plaintiff and her children lived in the Defendant's household for some two years. Again the Plaintiff professed almost entire ignorance of the expenditure necessarily incurred by the Defendant in maintaining her and her children. The subsequent accounts [Exhibits G and H] are not acknowledged by her signature or thumbprint but I am satisfied that she and her children were so maintained at the expense of the Defendant, with her express or implied assent, and that he continued, with her concurrence, to incur expense in cultivating the Farm No. 581. Subject to the legal issues, I find, the Defendant is entitled to credit for such amounts as may be shewn, on investigation of the accounts, to have been expended by him in payment of Sabhapati's debts, in maintenance of the Plaintiff and her children, and in cultivation of the Farm No. 581 since the death. It appears to be agreed that the aggregate amount collected by the solicitors on account of proceeds of crops under the Assignment is £1,086.15.7 (up to the 27th November, 1963) and that the Company, or its successor, holds a balance of £349.3.11 pending the outcome of this litigation.

Turning to the legal issues, it is alleged on the part of the Plaintiff that the Assignment was given for a past, or an illegal, consideration. The allegation as to past consideration has not been fully argued either on the facts or the law. I assume that so far as it rests on matters of fact it is based on the ground that the Assignment was made in consideration of an antecedent debt, namely the amount then due to the Defendant, be it £780.0.4 or whatever on investigation the figure proves to be. The alternative allegation that the consideration was illegal rests on the assertion that the Share-Farming Agreement was an illegal dealing in native land, contrary to section 12 of the Native Land Trust Ordinance (Cap. 104). Admittedly, the consent required by that section was not obtained.

In my view, the contention that the Assignment was invalid as given for past consideration wholly fails, both on the facts and the law. On the evidence and in the light of the surrounding circumstances, I find that it was given to the Defendant as a security, and that such security was to extend not only to the then present debt due to the Defendant but also to such future expenditure as the Defendant was to incur in maintaining the Plaintiff and her children on their going to live in his household, and in continuing to cultivate the farm under the Share-Farming Agreement. The Defendant incurred such expenses, the exact amount of which remains to be ascertained. Thus there was present consideration consisting, at least,

in his promise to maintain her and her family, and probably also in consenting to continue cultivation of the farm. The obligations which the Defendant thereby assumed were subsequently acted upon and performed. Moreover, as it appears to me, in so far as the £780.0.4 — or whatever be found to be the precise amount on the taking of the accounts — has been liquidated by the receipt of proceeds of crops by the solicitors and the crediting thereof to the Defendant's account, it is too late for the Plaintiff to take objection. The same applies to any such credit on account of the Defendant's subsequent expenditure. On general principles the first receipts on account of proceeds of the crops would be appropriated to the discharge of the earlier, the antecedent, debt. Although performance of a promise given for past consideration may not be enforced, if in fact the promise is performed no cause of action arises merely because the consideration for the promise was past consideration. An antecedent debt is nevertheless a valid subsisting debt.

Even on the assumption that the only consideration for the Assignment was the antecedent debt and, further, that the Assignment amounted to no more than an agreement that the proceeds of the crops should be received by the Defendant, as it appears to me, the Plaintiff's case fails on the plea of past consideration. First, I would say that if it actually effected the vesting of an interest in property in the Defendant (the crops or the proceeds of sale thereof) then, as appears from the recent case of *Bhagwat Prasad v. Jayantilal & Others* (Fiji Court of Appeal, C/A No. 2 of 1964)* it is immaterial whether or not there was consideration. Apart from fraud, and such statutory provisions as are contained, for example, in the Bills of Sale and the Moneylenders legislation, the only relevance of consideration in the case of a document effecting or purporting to effect the creation, transfer, mortgage etc. of an interest in property is in a case where the document is imperfect when the absence of consideration may give rise to the defence that 'Equity does not aid a volunteer' or that 'There is no equity to perfect an imperfect gift'. In other words, the doctrine of consideration is a contractual one. But assuming for one moment that the Assignment operated only as a contract to assign property as a security, without consideration other than the antecedent debt, what is the legal position? In *Alliance Bank v. Broom L.J.* (N.S.) 34 Eq. 256, where a customer of a bank, by letter, promised to hypothecate certain goods to secure his already overdrawn account, it was held that from the nature of the transaction some forbearance to sue on the part of the bank must be assumed and that this was sufficient to prevent the promise to hypothecate from being nudum pactum. In that case, however, the bank had requested the defendants to give security. In the case of *Fullerton v. Provincial Bank of Ireland* [1903] A.C. 309, forbearance was inferred. Lord MacNaughten, at p. 313, said —

"In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time,

* This judgment, which is unreported, refers to the fact that under section 19 of the Land (Transfer and Registration) Ordinance a mortgage, upon registration, has the effect of a deed; and that the wording of section 3 (1) of the Crop Liens Ordinance (Cap. 194) contemplates that a crop lien may be given to secure an existing debt. — Ed.

it is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. That proposition seems to me to be established by the case of *Alliance Bank v. Broom*."

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The concurring judgments of Lords Shand, Davey and Lindley were to the same effect. In *Glegg v. Bromley* [1912] 3 K.B. 474, Mrs. Glegg being indebted to her husband executed in his favour a Deed of Assignment. It was recited that he had requested her to give him further security. The Court of Appeal held that the Assignment was made for a good consideration, which was the matter there is question. Vaughan Williams L.J. referred to the decision of Parker J. in *Wigan v. English and Scottish etc. Association* [1909] 1 Ch. 291, 297, and proceeded —

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"In the early part of his decision Parker J. affirms a proposition with which I should imagine every one agrees — that is, that the mere existence of a debt is not good consideration in itself. One expects the assignment to be connected with some benefit or advantage which accrues to the assignor. Parker J. then proceeds to consider whether in that case there was good consideration or not. He says this: 'It appears to me to be reasonably clear that the mere existence of a debt from A to B is not sufficient valuable consideration for the giving of a security from A to B to secure that debt'. I may say that I entirely agree with that proposition. He goes on: 'If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time'."

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Fletcher Moulton L.J., at p. 486, said —

"... the mere existence of an antecedent debt is not good consideration for an assignment even by way of further security. If there has been pressure and in response to that pressure the further assignment is made, that suffices. But the cases also show that even if there has not been pressure, but there has been a further assignment, and it is known to the person who is the creditor and has the power to put pressure upon the debtor that a further assignment has been made, the law will, if it possibly can, give effect to the probability that the fact that the security has been increased will have influenced the creditor and made him more forbearing. I go so far as to say that in the absence of evidence to the contrary I should presume that the increase of the security when known would be responded to by an increase of forbearance on the part of the creditor."

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Parker J., in his concurring judgment, pointed out that in *Wigan v. English and Scottish etc. Association* the mortgagee had no notice of the security. He went on to say, at p. 491 —

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"I think that where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the

security, he would have taken action which he forbears to take on the strength of the security”

- A These authorities were referred to with approval by Denning J., as he then was, in *Bob Guinness Ltd. v. Salomonsen* [1948] 2 K.B. 42. Applying these decisions I hold that even if the Assignment had effect contractually only and was given merely to secure an antecedent debt it is to be implied in the light of the surrounding circumstances that there was consideration therefor consisting in forbearance by the Defendant to enforce payment. The fact that the Assignment is prefaced “For valuable consideration” goes to support this view.

- B Thus far I have assumed that consideration was required by law on the basis that the Assignment is in terms, substantially, of an assignment of future property, namely future crops and the proceeds of sale thereof. In so far as it affects the proceeds it is an assignment of a future chose or future choses in action. In *re McArdle* [1951] 1 All E.R. 905, Lord Evershed, dealing with that subject, approved the following statement appearing in the twenty-second edition of *Snell's Equity*:

“Whether value is necessary for an equitable assignment is not clearly settled.

- D It has been held that value is not necessary for an assignment of a legal thing in action which complies with the statutory provisions, and it would seem to be unnecessary also for an assignment of an equitable thing in action, such as a legacy or an interest in trust funds, provided that the assignment is complete and perfect; there is no reason why a man should not be able to give away an equitable interest as freely as he can give away a legal interest. But value appears to be necessary for an equitable assignment of a legal thing in action; such an assignment being inoperative at law, the assistance of equity is needed to make it effective, and equity will not assist to make perfect an imperfect gift. Value is certainly necessary for the assignment of rights of property not yet in existence.”

- E The reference to statutory provisions is to section 136(1) of the Law of Property Act 1925, replacing (in England) section 25(6) of the Judicature Act, 1873. The statement that consideration is necessary for an equitable assignment of a legal chose in action may be open to criticism (see 59 Law Quarterly Review 58, 129 and 208), but the statement that consideration is required for an assignment of a future chose in action appears unexceptional (*Subamma v. Aziz & Sons* (1958) Fiji L.R. 109, per Sir George Finlay at p. 112). It has been held that future rents are capable of legal assignment under the statute; so also a balance thereafter standing due to the credit of the assignor's account at a bank (see 4 *Halsbury's Laws of England* (3rd Edn.) para. 1003). The basis of these decisions was explained by Scrutton L.J. in *Earle v. Hemsworth R.D.C.* (1928) 140 L.T. 69, as follows —

- H “. . . it has been effectively determined by a series of cases binding upon us now that where the thing assigned arises out of an existing contract, although it may not become payable until

a later date than the assignment, it is a debt or other legal thing in action which can be assigned (under the statute)."

In the present case it is by no means apparent that the proceeds of future crops were to arise out of a contract existing at the date of the Assignment; I would assume that the contrary is the case. On that view the proceeds were not capable of legal assignment, without consideration, under the relevant statutory provisions. Further, it may well be that the section of the Judicature Act, 1873 is not in force locally. As I have held, however, the Assignment was good as a contract, for consideration, to assign future proceeds.

The same result would, of course, follow if the Assignment took immediate effect as a perfected assignment of crops, present and future. In this connexion, *Halsbury's Laws of England*, 3rd Edn. (Vol. 29 para. 774) states —

"774. Personal chattels, which, at the date of the assignment, are either not in existence or not the property of the grantor, are not assignable at common law, unless the grantor has already a potential property in them as present owner or possessor of that which is expected to produce them"

The case of *Petch v. Tutin* (1846) 15 M. & W. 110 is referred to in a footnote to this passage in support of the proposition that a tenant of land may make a presently effective assignment of all his interest in future crops. But in that case the transaction was by deed and thus it was effectual at law. This must, I think, distinguish it from the present case. I would therefore prefer to rest my decision on this aspect of the case upon the grounds previously stated.

The moral is obviously to execute such documents under seal.

Turning to the question whether the Assignment was given for an illegal consideration, it is first to be observed that, if it was, the Plaintiff is debarred from recovery of any of the proceeds already collected by, or credited in the accounts to, the Defendant under the Assignment (vide *Scott v. Brown* etc (1892) 2 Q.B. 724, 734). Further, assuming the Share-Farming Agreement to have been an illegal transaction, inasmuch as the Plaintiff's predecessor in title, Sabhapati, was a party to the illegality, and she herself has likewise acted on the Agreement, the maxim *in pari delicto potior est conditio defendentis* applies (vide *Berg v. Sadler & Moore* [1937] 1 All E.R. 637). The Plaintiff is not one of a class for whose benefit or protection section 12 of the Ordinance (Cap. 104) was enacted.

Subject to these observations, the questions which arise on this issue are whether the Farm No. 581 was native land; if so, whether the Share-Farming Agreement was a 'dealing' within the meaning of section 12; if so whether the Assignment was tainted with the illegality; and, ultimately, whether it would be of any assistance to the Plaintiff to have it declared that the Assignment was void for the illegality.

It is common ground that the farm is comprised in a Lease made between the Buli Vuda, a Fijian official of the Vuda district, on behalf of the Fijian owners of the one part, and the Commissioner of Lands

on behalf of the Crown of the other part. Under this Lease (hereinafter referred to as 'the Lease') the land was demised to the Crown for the term of 99 years from the 1st January, 1900. The Lease is still subsisting in favour of the Crown. It is also clear on the evidence that the land was found by the Native Land Commission, acting under the Native Lands Ordinance (Cap. 103) in the year 1914, to be owned by a Fijian proprietary unit. The Lease is endorsed as registered in the "Register of Crown Leases" and is headed "Crown Lease". (There are in fact two such leases in identical terms but according to the evidence the relevant lease is Exhibit M, the land in question being part of land called Block A.) By a Sub-lease [Exhibit O] dated the 13th November, 1901, the Commissioner of Lands, on behalf of the Crown, subleased Block A to the C.S.R. Co. for the term of 10 years from the 1st January, 1900. It was expressly declared therein that the Sub-lease was a protected lease under the provisions of Ordinance No. IV of 1888, that is to say that restrictions on alienation were to apply. A memorandum dated September, 1910, is endorsed on the Sub-lease to the effect that it was renewed for a term of 40 years from the 1st January, 1910, by the Commissioner of Lands. In 1940 the Native Land Trust Board was established under Cap. 104 and thereby entrusted with the control of and power to grant leases of native land, as defined. Sometime thereafter, according to the evidence, by informal arrangement the Board took over administration of (*inter alia*) Block A from the Commissioner of Lands. By a document dated the 29th December, 1951, signed by its Secretary, the Board agreed to grant to the C.S.R. Co. a lease of (*inter alia*) Block A for the term of 50 years from the 1st January, 1950. A further document, in substitution for the foregoing, was issued on the 27th November, 1956, conveying the Board's decision to grant a lease to the Company for 50 years from the 1st January, 1957 [Exhibit R]. The Company periodically submits a list of changes in the occupancy of the land by its tenants to the Board which issues overall approvals thereof, purporting to be consents to such dealings under the Ordinance (Cap. 104). The Board collects the agreed rent from the Company, and accounts for the net rent to the ultimate Fijian owners. For some years therefore, following the informal arrangement between the department responsible for Crown lands and the Board, the Board has acted as if the land were 'native land', notwithstanding the subsistence of the Lease in favour of the Crown. It is part of the arrangement that as soon as the formalities of survey are completed the Crown will surrender the Lease, presumably to the Fijian owners as the Ordinance (Cap. 104) does not contemplate the vesting of native land in the Board. Thereupon the Board will implement its agreement [Exhibit R] to grant a lease to the C.S.R. Co. by executing a formal lease in the Company's favour under the powers conferred by the Ordinance. The C.S.R. Co. has throughout remained and still remains in occupation, by itself or its tenants; latterly, of course, under the document Exhibit R.

The functions of the Board are entirely statutory and limited to 'native land'. 'Native land' is defined, by the Ordinance (Cap. 104) to mean land which is neither Crown land nor the subject of a Crown or native grant. The term 'native grant' may be ignored as it is recognised, at least for the purpose of these proceedings, that this

means a native grant in fee simple. Under the Native Lands Ordinance (Cap. 103), which established the Native Land Commission and charged it with the duty of ascertaining the extent, ownership and boundaries of native lands (with the object not only of defining native lands but also of the remaining lands not privately owned being declared Crown lands), 'native lands' are defined to mean lands which are neither Crown lands nor the subject of a Crown grant. It is contended by Mr. Stuart, for the Defendant, that during the currency of the Lease the land thereby demised to the Crown must be 'Crown land'; the informal arrangement between the Government and the Board that the land is to be dealt with by the Board pending surrender of the Lease as if it were native land is an arrangement having effect only in equity, not affecting the registered title. Mr. Koya, for the Plaintiff, contends that the Commission found the land to be native land and duly caused it to be registered as such; the fact that the Lease subsists in favour of the Crown does not affect the status of the land as native land; alternatively, the Government having agreed to surrender the Lease and having agreed to the Board exercising control pending a formal surrender, and the Board having agreed to grant a lease under the Native Land Trust Ordinance to the C.S.R. Co., the Company now holds subject to that Ordinance, and so therefore does anyone deriving title under the Company. So it is argued.

Neither Ordinance, it appears, defines 'Crown land', nor does either of them make express provision for the case where native land was already leased to the Crown when the Board came into existence, as is the position in this case. The Crown Lands Ordinance (Cap. 138) is not helpful except that it appears to recognise 'Crown grant' as meaning a grant in fee simple, as does also section 9 of the Land (Transfer and Registration) Ordinance (Cap. 136), and that the Crown Lands Ordinance does contemplate leases of land to the Crown, as did the Ordinance No. IV of 1888. The argument as to registration of title does not appear to me to lead to a solution of the problem. The provisions of the Land (Transfer and Registration) Ordinance with regard to both Crown grants and native grants relate to grants in fee simple. Initial registration of Crown leases, that is leases by the Crown, is dealt with by the Crown Lands Ordinance and initial registration of native leases granted by the Board under Cap. 104 is dealt with by that Ordinance. There appears to be no provision for registration of leases to the Crown. There being no subsisting lease to the C.S.R. Company capable of registration, it follows, in my view, that the state of the various Registers of Title does not affect the position.

As I see it, both the Ordinances, Cap. 103 and Cap. 104, contemplate a broad division between native lands and Crown lands in reference to the ultimate title (not, of course, including the Crown's rights as *ultimus haeres* but rather in the sense of the freehold title). It is at least clear that the Ordinance Cap. 104 did not have effect to extinguish the Lease. No doubt if the land comprised therein had continued to be dealt with by the department responsible for Crown lands the department would have dealt with it under the provisions of the Crown Lands Ordinance, but by virtue of the informal arrangement it has been, and remains, treated as if it had been properly

- brought within the scope of the functions of the Board as a result of formal surrender. Did this arrangement, or does the fact that the 'freehold' is native land, followed by the agreement by the Board to grant a lease to the Company, have the effect of making the Company and anyone deriving title under it a 'lessee (or sublessee) under the Ordinance' (section 12(1) and (2))? The point was not dealt with in *Ramlingham v. President etc. of the Ramkrishna Mission Fiji* (1963) 9 F.L.R. 95 to which Counsel have referred. The matter appears to raise questions of estoppel and ultra vires.
- A In *Harnam Singh v. Jamal Pirbhai* [1951] A.C. 688, at 699, the Privy Council held that where a landlord and tenant had agreed that the tenancy was a statutory tenancy their respective rights and obligations were to be regarded in law as so governed (see also *Lyle-Meller v. Lewis* [1956] 1 All E.R. 247 at 251). The cases of *Stratford v. Syrett* [1957] 3 All E.R. 363 at 365 and *Stone v. Levitt* [1946] 2 All E.R. 653 at 655 shew, however, that estoppel cannot give rise to jurisdiction contrary to the
- B terms of a statute. A closer analogy, perhaps, is to be found in the case of *Rhyl U.D.C. v. Rhyl Amusements Ltd.* [1959] 1 All E.R. 257, at 265-6, and in the cases there cited, which establish that the doctrine of estoppel cannot operate to overcome the ultra vires rule. Applying these decisions, the conclusion to be reached in my judgment is that although the Company has agreed to accept a lease by the Board under the Native Land Trust Ordinance, which it obviously has done
- C by continuing in occupation and paying rent under the terms of the document Exhibit R, this cannot operate to estop a third party such as the Defendant from asserting that it was ultra vires the Board to grant, and consequently to agree to grant, a lease thereof prior to the actual surrender of the Lease. (See also *Howell v. Falmouth etc. Co.* [1951] 2 All E.R. 278 to the effect that no conduct or representation on the part of the Crown can affect the application of statutory
- D provisions). Whilst it might be competent for a private person, or a corporation with unlimited powers, to act upon an arrangement such as that arrived at by the Board with the Crown, the position is different where the capacity of a party is limited by statute, as the Board's capacity is limited. The question remains whether the land was, as a matter of law, 'native land' within the meaning of Cap. 104.
- E It would not be enough to say that where there is a subsisting lease of native land, granted before the constitution of the Board, the Board is not competent to deal with the land except by the grant of some interest reversionary on, or subject to the terms of, the lease, because this is a case where the lessee, the Crown, has agreed to it doing so. And I do not mean to imply that it is ultra vires the Board to grant reversionary leases per se. But, as I have said, no informal
- F arrangement can serve to enlarge the powers of the Board, such as by treating as 'native land' land which is not, for the time being, native land within the meaning of the Ordinance. Nor am I to be taken as holding that a person who has merely agreed to take a lease of native land from the Board, where the Board is in a position to grant such a lease in the exercise of its statutory powers, is not a
- G 'lessee under this Ordinance' for the purposes of section 12 of Cap. 104; such a person, it might well be said, could not accept the benefit without accepting the burden of the agreement, and would, therefore, be bound by the provisions of section 12. The matter must, I think,
- H

be determined primarily as one of statutory construction. Under Cap. 104 the land is native land. The Board is not purporting to deal with Crown land. In the absence of the arrangement with the Crown the Board's powers would be limited to the grant of interests reversionary on or subject to the Lease. The arrangement permits the grant of leases taking effect in possession. It is not to be viewed as an attempt to enlarge the statutory powers of the Board, but rather as an arrangement which any person having power to deal with land might enter into. The division between native land and Crown land contemplated by the two Ordinances is between land which is primarily native land and land which is primarily Crown land, and the main purpose of Cap. 103 was to ascertain which category lands fell within. On this basis I hold that where, by agreement with the holder of a subsisting lease of native land granted prior to the commencement of Cap. 104, be the holder the Crown or someone else, the Board is enabled to grant a lease of the land taking effect in possession the statutory provisions present no obstacle to it so doing. For these reasons I hold that the restrictions contained in section 12 of Cap. 104 applied, and continued at all material times to apply, to Farm No. 581.

As to whether the Share-Farming Agreement was a 'dealing' within the meaning of section 12, I have no doubt it was. Under its terms the Defendant was to enter into immediate occupation of the farm and to cultivate it, sharing in the expenditure and sharing in the proceeds. At the least he was a licensee with an interest. The word 'dealing' is deliberately chosen to embrace such situations. In all but name he was a tenant in common with the deceased, and after his death with the Plaintiff.

Then the question arises, whether the Assignment was tainted with the illegal Share-Farming Agreement as a document collateral to it. It would appear that it was (*Fisher v. Bridges* (1853) 22 L.J.Q.B. 270; on appeal (1854) 23 L.J.Q.B. 276) except, possibly, so far as it was intended to secure moneys other than those arising under the Share-Farming Agreement (cf. *Pickering v. Ilfracombe Railway Co.* (1868) L.R. 3 C.P. 235; *Re Burdett* (1888) 20 Q.B.D. 310; and *Re N. Wales etc. Co.* [1922] 2 Ch. 340). This latter question of severance however appears academic, in the circumstances of the case, as no doubt the Defendant will have already received, or been given credit in the accounts for, amounts due to him otherwise than under the Share-Farming Agreement. Further, in so far as he has already received, or been given credit in the accounts for, moneys payable under the Share-Farming Agreement, the Plaintiff, as I have said, has no right of recovery.

Finally there is the question whether the Plaintiff should have it declared that the Assignment was void as given for an illegal consideration, at least in part. This is relevant to the proceeds still held by C.S.R. Co. or its successor, namely the £349.3.11, and to any proceeds not paid over to or credited to the Defendant prior to these proceedings. In my view, for the reasons I have endeavoured to state, the Assignment is void for illegality with respect to those moneys and the Plaintiff is entitled to a declaration accordingly, notwithstanding that she became a party to the illegality.

- In the result the Plaintiff's case fails on the issue of misrepresentation and or the claim that the Assignment was void as given for a past consideration. On the claim for a declaration that the Assignment is void as given for an illegal consideration I grant a declaration in the terms that the Assignment is void for illegality, to which the Plaintiff was a party, with respect to the sum of £349.3.11 and with respect to such other sums (if any) representing proceeds of crops as appear not to have been paid over to the Defendant or credited to him in the accounts prior to the commencement of this action. If necessary the form of the declaration may be settled in Chambers. I will hear Counsel as to the making of any necessary order for the taking of accounts, and on the matter of costs also.
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Limited declaration granted.