

**In the Privy Council.****ON APPEAL**  
*FROM THE SUPREME COURT OF FIJI.*UNIVERSITY OF LONDON  
W.C.1.  
9 - NOV 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

THE ATTORNEY-GENERAL OF THE COLONY OF FIJI

*Appellant*

AND

J. P. BAYLY, LIMITED

*Respondent.***RECORD OF PROCEEDINGS.****INDEX OF REFERENCE.**

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In the Privy Council.

ON APPEAL  
FROM THE SUPREME COURT OF FIJI.

BETWEEN

THE ATTORNEY-GENERAL OF THE COLONY OF FIJI *Appellant*

AND

J. BAYLY, LIMITED *Respondent.*

RECORD OF PROCEEDINGS.

10

No. 1.

STATEMENT OF COMPLAINT.

No. 17 of 1944.

IN THE SUPREME COURT OF FIJI.  
J. P. BAYLY LIMITED

Plaintiff

vs.

THE ATTORNEY-GENERAL OF THE COLONY  
OF FIJI

Defendant.

*In the  
Supreme  
Court of  
Fiji.*

No. 1.  
Statement  
of  
Complaint,  
14th  
March  
1944.

STATEMENT OF COMPLAINT.

1. (A) The Plaintiff is registered under the provisions of the Companies  
20 Ordinance 1913 of the Colony of Fiji as a company of limited liability.

(B) It carries on business in the said Colony.

(C) Its registered office is at Central Chambers, Victoria Parade, Suva,  
in the said Colony.

(D) The Managing Director of the said Company is John Percy Bayly  
of Rasikula, Sigatoka in the said Colony, Rubber Planter and Grazier.

2. The Plaintiff was at all times material to this complaint and is the  
registered proprietor and through its agents servants and workmen was  
at all times material to this complaint and is the occupier of all that piece  
of freehold land known as "Wainadoi" in the district of Veivatuoa on  
30 the Island of Viti Levu in the said Colony containing two thousand nine  
hundred acres described and comprised in Certificate of Title Volume IX/05  
Folio 226A hereinafter referred to as the said land.

3. The said land is situated on the main Government Road from  
Suva to Navua approximately seventeen miles from Suva aforesaid.

*In the  
Supreme  
Court of  
Fiji.*

No. 1.  
Statement  
of  
Complaint,  
14th  
March  
1944,  
*continued.*

4. The said land chiefly comprises a rubber plantation which is conducted and operated by the Plaintiff.

5. (A) A stream known as the Wainadoi creek flows to and through the said land to the sea.

(B) The said stream is not tidal at any point, material to this complaint.

6. (A) On the said land adjacent to the said stream are large deposits of gravel.

(B) Such said deposits lie upon both sides of the said stream and at varying distances therefrom.

7. (A) The Director of Public Works of the Colony of Fiji through 10 his agents servants and workmen, upon sundry occasions entered upon the said land and removed and took away, and continues to remove and take away from the said land large quantities of gravel without the permission of the Plaintiff or any person on its behalf.

(B) The said gravel has been removed as aforesaid from parts of the said land other than from the bed of the said stream.

8. The Plaintiff has complained to the Director of Public Works of his said actions, and has claimed :—

(A) That the gravel removed as aforesaid belongs to it ;

(B) Therefore, it is entitled to compensation for such removal 20 as aforesaid.

9. The director of Public Works replied to such complaint to the following effect :—

(A) That by virtue of Section 5 of the Rivers and Streams Ordinance Number 2 of 1880 of the Colony of Fiji all streams and the beds thereof belong to the Crown.

(B) That the said gravel removed as aforesaid has been taken from the bed of the said stream.

(C) Consequently, the said gravel deposits belong to the Crown.

(D) That the Plaintiff, therefore, is not entitled to any 30 compensation.

10. (A) The Plaintiff admits that all streams and the beds thereof belong to the Crown, but

(B) The Plaintiff says those parts of the said land from which the said gravel has been removed as aforesaid do not form part of the bed of the said Wainadoi Creek.

11. In consequence of the said actions of the Director of Public Works the Plaintiff has suffered loss by reason of :—

(A) The removal and taking away of the said gravel from the said land. 40

(B) Injury to certain rubber trees of the Plaintiff growing on the said land.

WHEREFORE, THE PLAINTIFF CLAIMS :—

(A) A declaration that the said deposits of gravel are upon the land of and belonging to the Plaintiff.

(B) A declaration that the land from which the said gravel has been removed as aforesaid does not form part of the bed of the Wainadoi Creek.



(c) A declaration that it is entitled to compensation under Section fourteen of the Roads Ordinance Number 6 of 1914 of the Colony of Fiji.

(d) An enquiry into the quantity of gravel removed as aforesaid.

(e) Payment of compensation in respect of the amount of gravel removed and taken away as aforesaid by the Director of Public Works.

(f) Damages.

10

(g) Costs.

*In the Supreme Court of Fiji.*

No. 1.

Statement of Complaint, 14th March 1944, *continued.*

(Sgd.) NOEL McFARLANE.

This statement of complaint was delivered on the 14th day of March 1944 by Messrs. GRAHAME & Co., of Central Chambers, Victoria Parade, Suva, aforesaid, Solicitors for the Plaintiff whose address for service is at the offices of its Solicitors.

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No. 2.

**GOVERNOR'S FIAT.**

From the COLONIAL SECRETARY

To THE REGISTRAR, SUPREME COURT.

20 Subject STATEMENT OF COMPLAINT: J. P. BAYLY *v.* ATTORNEY-GENERAL.

No. 2. Governor's Fiat, 13th April 1944.

Date 13th April, 1944.

The above Statement of Complaint has been laid before the Governor in Council and the Governor's Deputy has ordered that consent be given to the preferment of the claim against the Government by Mr. J. P. Bayly.

2. The Statement forwarded under cover of your memorandum No. 4/1/221 of the 15th March, 1944, is returned herewith.

(Sgd.) G. K. ROTH,

for Colonial Secretary.

30

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No. 3.

**STATEMENT OF DEFENCE.**

IN THE SUPREME COURT OF FIJI.

No. 17 of 1944.

Between J. P. BAYLY LIMITED

- Plaintiff

and

THE HONOURABLE THE ATTORNEY-GENERAL FOR THE COLONY OF FIJI Defendant.

No. 3. Statement of Defence, 26th April 1944.

**STATEMENT OF DEFENCE.**

1. As to paragraphs 1, 2, 3, 4 and 5 of the Statement of Complaint  
40 the Defendant admits the allegations contained therein.

*In the  
Supreme  
Court of  
Fiji.*

No. 3.  
Statement  
of  
Defence,  
26th  
April  
1944,  
*continued.*

2. As to paragraph 6 of the Statement of Complaint the Defendant says :—

(A) the Defendant admits that there are large deposits of gravel in the bed of the stream but denies that any part of such gravel deposits as are in dispute in this action are on the land of the Plaintiff ;

(B) the Defendant denies the allegation contained in paragraph 6 (B) and says that such deposits lie in the bed of the stream.

3. As to paragraph 7 of the Statement of Complaint the Defendant says :— 10

(A) the Defendant admits that the Director of Public Works of the Colony of Fiji through his agents, servants and workmen has entered and continues to enter upon the land of the Plaintiff for the purposes of gaining access to the bed of the said stream and has removed and continues to remove gravel from such bed but except as herein expressly admitted the Defendant denies each and all the allegations contained in paragraph 7 (A) of the Statement of Complaint ;

(B) the Defendant denies the allegation contained in paragraph 7 (B). 20

4. As to paragraphs 8 and 9 of the Statement of Complaint the Defendant admits the allegations contained therein.

5. As to paragraph 10 of the Statement of Complaint the Defendant repeats paragraph 2 herein.

6. As to paragraph 11 of the Statement of Complaint the Defendant denies each and all of the allegations contained therein, and says :—

As to sub-paragraph (B) thereof the Defendant has by letters dated 27th March 1944 and 17th April 1944 asked for particulars of the alleged loss by reason of injury to certain rubber trees and the Plaintiff has by letter undated replied that he does not intend to press the claim and is not claiming any amount in respect thereof. 30

And for a further and affirmative defence the Defendant says :—

7. That under section 5 of the Rivers and Streams Ordinance 1880, all streams and beds thereof belong to the Crown.

8. That at all the times material to this action all gravel removed by the Director of Public Works through his agents, servants and workmen was removed from the bed of the Wainadoi Creek and at no material time has the Director of Public Works as aforesaid removed gravel from the land of the Plaintiff.

Delivered this 26th day of April 1944.

40

(Sgd.) E. E. JENKINS,  
Attorney-General.

**No. 4.**  
**JUDGE'S NOTES.**

*In the  
Supreme  
Court of  
Fiji.*

IN THE SUPREME COURT OF FIJI.

Civil Jurisdiction.

No. 17 of 1944.

Monday, 12th August, 1946.

No. 4.  
Judge's  
Notes.

Between J. P. BAYLY LIMITED

Plaintiffs

and

ATTORNEY-GENERAL OF FIJI

Defendant.

10 Mr. G. F. Grahame, with him Mr. D. M. N. MacFarlane, for the Plaintiffs.

Hon. J. H. Vaughan, Attorney-General, for the Defendant.

—————

MACFARLANE opens : (1) Where was the gravel taken ?

(2) Is this the " bed " of the stream in law ?

Consider Court should view the locus.

VAUGHAN : Agree Court should visit locus.

Put in agreed set of plans.

MACFARLANE : Put in plans we will prove later. (Not admitted.)

Adjourn to view locus on 13th.

20 13th August, 1946 : Visit locus with Counsel.

—————

*Wednesday, 14th August, 1946.*

SECOND DAY.

VAUGHAN : (1) Issue to ascertain places from which Public Works Dept. have taken gravel.

(2) Do these places constitute in law the bed of the stream ?

MACFARLANE : We are also claiming for damage to our freehold.

THE COURT : That also is in issue.

(3) If Defendant has taken unlawfully is the Plaintiff entitled to damages, and if so how much ?

30 VAUGHAN : Agree.

MACFARLANE : Call——

*In the  
Supreme  
Court of  
Fiji.*

*Plaintiff's  
Evidence.*

No. 5.  
Henry  
Herbert  
Whittaker,  
14th  
August  
1946.  
Examina-  
tion.

No. 5.

**EVIDENCE of Henry Herbert Whittaker.**

Witness: HENRY HERBERT WHITTAKER, sworn.

Registered surveyor. Twenty years in Fiji. Know the stream running through Plaintiff's land.

16th February, 1944, on instructions from Plaintiff, surveyed and made a plan of this stream which I produce (Ex. A.). Red areas are what appeared to me to be excavated areas.

It appeared that gravel had been taken out of the area nearing 330 feet but that the white portion had been left as high land. Would not be 10 certain how much of that area was grass covered.

There was a thatched hut just below the Ivi tree which was about 100 feet from the water's edge at the Ivi tree, and 30-40 feet from the dump behind it. There was a lot of gravel on the dump at the time (Feb. 1944). Below the dump was all gravel.

The road "not formed or gravelled" further up consisted of lorry and tractor marks. This tractor road went through what appeared to be an excavation for gravel. There was a well defined bank there about 2 feet high.

The area on the other side marked 200 × 100 ft. appeared to be an 20 excavated area. The area behind that is now covered with grass.

When I made the plan (Feb. 1944) lorries were working in the bed of the stream just above the Ivi tree and below it as well.

April 1946 made a further survey of the area. I mapped the course of the stream as indicated by Bryant as he said it was in August 1941. This is marked in red. Produce this plan (Ex. B). The blue stream is where the water was actually flowing. Bryant put in stakes as numbered on the plan. The shed shown near Bryant's house was new since 1944. The bure near the Ivi tree had disappeared.

Between 4 and 5 the stream passes to-day to the south of a fallen 30 Ivi tree. In 1944 that would have been on the south bank and not the north bank.

"Old excavations" between 2 and 3 are the excavations shown on the 1944 plan.

The iron peg at "C" on Ex. B was not put in by me. In April 1946 that was gravel partly in grass.

The buildings shown in Ex. A near the smoke house are still there.

In my opinion thousands of yards of gravel had been removed—more than 10,000.

In 1944 made one visit only—for 2-3 days. The road on the north 40 bank was usable. Lorries were using it. Do not know what lorries.

As regards the red areas on Ex. A, it appeared that the whole of the areas had at some time been excavated—by water or by hand.

The high land shown on the north bank N.E. of the Ivi tree was gravel with earth on top. Could not say how much earth.

There were heaps of gravel near the bure at the Ivi tree. It was good, clean gravel.

Do not know whose lorries I saw working. They were coming in and out all day long. At least half a dozen at a time.

Have seen the loop 10-11-12 on Ex. B. Do not think this would 50 disappear in the ordinary course of nature. A very high flood could do it. There would be some natural erosion.

Cross-  
examina-  
tion,

## No. 6.

## EVIDENCE of Christopher Havergill Bryant.

Witness : CHRISTOPHER HAVERGILL BRYANT, sworn.

Came to Fiji in 1930. Stayed here 6 weeks. Came back 1931 and have been ever since. Have been connected with land most of the time.

Before I came here I was sugar farming in North Queensland.

Been at Wainadoi since 13th August 1941—fix the date from my wage book.

10 Sawmilling there on a basis with Bayly. I built the sawmill there 1941.

When I went there in 1941 P.W.D. had two big heaps of ballast pulled up with a drag rope. At that time nobody else was working gravel. The New Zealand Air Force and Williams & Gosling started to work gravel at the end of 1941 and on a bigger scale from February 1942—after the Jap war started.

P.W.D. operations seemed to be in charge of Fitzpatrick. Willoughby came occasionally—not very often. He was the Inspector of Roads and had a section from 1½ miles south of Wainadoi to Suva.

20 When I first went there P.W.D. had a few lorries only—1-2-3-4. They worked every day except Saturday and Sunday. The lorries were about 1½ ton.

I lived on the premises all the time. Built the sawmill where it is now. Had a tent on the site of my present house.

One of my men lived in a bure near by.

When I got there the P.W.D. were operating at “ C ” on Ex. B. There were huts on the site shown north of “ C. ” Road C was high grass land with trees (mandarin and lemon). They had two big heaps of gravel near “ C. ”

30 Accompanied Whittaker in April 1946 and put in stakes as shown on Ex. B. These represent the river as it was till Easter 1942, and as I found it in 1941.

Opposite the Ivi tree in 1941 it was a high promontory with grass on top and a few rubber trees and scrub trees.

40 The P.W.D. were operating with a drag line operated by a tractor and a double winch on it. The tractor was at “ C , ” in Ex. B. The anchor block was on the opposite side at the promontory, which has now gone. The marks of the anchor block can still be seen at “ 16 ” near the Ivi tree. The anchor blocks were then on the south bank, and the tractor on the north. The tractor and anchor block were moved fanwise. The block at the tractor was on a pole about 15 ft. high.

In 1941 there was not a road to the “ Old Dump. ” If you had gone past it you would have gone straight into the river. The lorries got to “ C ” along the north bank of the river as it then was, passing the huts shown on the plan.

I had visited the place in 1940 and found the P.W.D. there then—at the same spot and using the drag rope.

They worked at “ C ” till Easter 1942 when a big flood came and washed the heap of ballast into the water.

50 There were two swimming pools—one where they were pulling ballast and the other at No. 8 on the plan where the bank was then about 10 feet

*In the  
Supreme  
Court of  
Fiji.*

*Plaintiff's  
Evidence.*

No. 6.  
Christopher  
Havergill  
Bryant,  
14th  
August  
1946.  
Examina-  
tion.

*In the  
Supreme  
Court of  
Fiji.*

*Plaintiff's  
Evidence.*

*No. 6.  
Christopher  
Havergill  
Bryant,  
14th  
August  
1946,  
Examina-  
tion,  
continued.*

high. I used to swim there. The New Zealanders swam where they were pulling ballast.

Pulling ballast across the river in the way they did weakened the promontory and erosion set in, weakened the bank and the first flood scoured the bank. It started coming between 8 and 9 near the old swimming pool.

The bucket acted as a scoop and made a channel. It had spikes on the bottom to dig into the soil. It started digging in the bank before it got to the water. Bucket would hold about 1/4 yd.

That flood was the only real flood I have seen. Yesterday was a 10 freshet.

After the heaps of ballast went the road was gradually eroded. The lemon trees were washed away.

After Easter 1942 the P.W.D. continued to take gravel where the stream used to be. The present road runs into the old river bed. The "old dump" was put there by Willoughby and the road past it was made by the P.W.D. After the promontory went gravel was taken from the former river bed by the P.W.D., the New Zealanders, the Fiji Army, Williams & Gosling and later the Americans. That is south of "C."

Ballast was also taken north of the Ivi tree. That which is now gravel 20 was formerly grass covered land. That was taken by P.W.D. and others. P.W.D. were in charge of Fitzpatrick till 1944.

After the flood the lorries travelled down the bed of the river which was about 9" deep. They would work back a chain or so from the bank. There were as many as 60 lorries. As a result the river gradually swung over as gravel was taken out—they worked down below the level of the river. As a result the river ultimately got into its present course.

The river used to go 9-10-11-12. In the bend the gravel was taken after the flood. The lorries went in from the south near No. 14 and also near No. 9. They worked the big bend out. They were all in it including 30 the P.W.D.

There were rubber trees between 9 and the dotted line.

Have never seen water over the big bend where the land was high. A freshet won't get up there. Only the flood went over it.

P.W.D. took gravel opposite the sawmill. When I went there stream ran 20-21-22-23. I have a water pipe from the sawmill which used to enter the river between 23 and 24 right on the bend.

P.W.D. had a drag line there. Tractor was between the rubber house and the bamboo. The dump was there. The anchor was near No. 24. There was gravel in grass near the sawmill. The P.W.D. took 40 that gravel.

The gravel they took about 23 was about 4 ft. above the water.

The bank went through erosion between the bamboo and the rubber house.

Then they took it up between 19 and 20 by drag line. When I went there there was a bank above 21-22 with grass on it. They worked the drag line straight across the river at 19-20. Anchor was at 19. They dug right into the bank and then away from the stream. When working there they dug so big a hole the river moved and the water failed at my pipe. 50

Fitzpatrick was in charge. He pulled the block out.

I made complaint and Mr. Robertson of the P.W.D. came. Robertson shifted Fitzpatrick straight away.

I had a tractor path which passed between the fallen Ivi tree and the pink stream. It then passed "A" and went up by "Old excavations."

Gravel was taken behind Nos. 4 and 5. Lorry marks are still there. That was taken in 1943, 1944 and 1945. In 1943 P.W.D. took it—also Americans and New Zealanders.

When I first went there the Ivi tree was standing up.

At 4-5 stream was just over 10 yds. width on the average. They were taking gravel 30 yds. from the edge of the stream.

10 My tractor went through the area shown in dark brown on Ex. A. That was solid ground covered with grass. Between my tractor track and the then edge of the stream was hard high bank.

They started taking gravel at 4 and 5 in 1943. That would be the area shown in Ex. A as 200 x 100 ft. P.W.D. were working at one time in 1943 under Anderson. Fitzpatrick was in charge.

Anderson had a fleet of lorries from Tamavua.

The gravel opposite 2 on the south bank was taken 1943-44. In 1943 there were New Zealanders and Americans and Williams & Gosling and P.W.D.

20 2-3-4-5 stream altered course when they broke the bank on the southern side and so started erosion.

Have never seen a flood go over the two upper areas marked "gravel in grass."

In a freshet the stream does not cover the 200 x 100 ft. area.

If they dig more above 20-21 the rubber house will go.

There was a gate between the bamboo and the main roads. Willoughby sent out a lock for it but I put one of my own on. The lock was broken. I put the tractor across the road near the rubber house. Williams & Gosling and P.W.D. were working there then. The road went between 22 and 23. They would not repair it, so I blocked them.

30 I still get my water from the river. I have to go 3-4 further down to get water. Opposite the sawmill.

That is due to the amount of ballast taken out.

August 1941 P.W.D. were working round "C" on Ex. B. Pole was at "C" and bucket worked on opposite bank. There was then a high bank with trees on it. Nobody there but P.W.D.

Deny that river had broken through in 1939.

Saw Bradnam there occasionally. Willoughby took over from Bradnam in July this year.

40 Bathing pool was at No. 8. Break started between there and 9. Water came through on the other side as shown on Ex. B.

1942 flood did not go through the rubber. Did not reach "gravel in grass" on the north. Did not reach the sawmill.

Have never seen water over the high banks.

Have never known river carry debris on to the bridge.

A few New Zealanders came end of 1941.

More New Zealanders came in again from February 1942. Williams & Gosling came March 1942.

The flood was on Good Friday 1942 (3.4.42).

50 Williams & Gosling started working on the promontory after the river changed.

New Zealanders were taking ballast from Fitzpatrick's dumps—stealing it.

*In the Supreme Court of Fiji.*

*Plaintiff's Evidence.*

No. 6.  
Christopher Haverhill Bryant, 14th August 1946, Examination, continued.

Cross-examination.

*In the  
Supreme  
Court of  
Fiji.*

*Plaintiff's  
Evidence.*

No. 6.  
Christopher  
Havergill  
Bryant,  
14th  
August  
1946,  
Cross-  
examina-  
tion,  
*continued.*

The Americans came later—after the flood.  
Willoughby sent a padlock to lock the gate and keep out parties other than the P.W.D.

Willoughby moved over to the other side of the river because the road became eroded on the north side. Think it was 1943, and is the road past my house.

They all took gravel between 9 and 14 from Easter 1942 till end of 1943. After the flood they took the lorries up and down the bend of the river.

At first after the break through the stream was slightly south of the 10 blue stream.

P.W.D. have taken gravel from every place from which gravel has been taken. They took earth with it and put it on the road.

When Anderson was working between 23 and 24 it was in March 1944.

They took spoil between 23 and 25 before the flood—say August/Sept., 1941—before anyone else came in.

Between 19–20 drag line pulled out gravel from the high banks. That was 2½ years ago. Fitzpatrick was in charge at the time.

Between 4–5 Anderson came from Tamavua in 1943 and fetched 20 gravel. It was gravel and grass. They took it 30 yds. from the river on hard solid ground.

Opposite 2–3 I saw P.W.D. lorries throughout 1943. Saw Anderson and Fitzpatrick there. Anderson was there when he was out from Tamavua. I did not complain to Anderson or anybody else. I told Bayly.

Deny that P.W.D. have confined themselves to banks of gravel drawn up by the river when in flood.

Agree there is always clean shingle in the bed of the river.

Deny that water regularly flows over what is marked “gravel in 30 grass.”

Small gravel banks are sometimes found after freshets.

Have known the P.W.D. stopped working once or twice by water in flood.

By Court :

I have no pecuniary interest in this case—one way or the other.

No. 7.  
Francis  
Seymour  
Whitcombe,  
14th  
August  
1946.  
Examina-  
tion.

No. 7.

**EVIDENCE of Francis Seymour Whitcombe.**

Witness : FRANCIS SEYMOUR WHITCOMBE, sworn.

Lived all my live in Fiji.

Know Wainadoi Creek since 1939.

1941 I was working for Suva Town Board. Now employed Carpenters. In 1941 was overseer of works. Knew Bryant in 1941. He was then living at Wainadoi—in December 1941.

Dec. 1941 I arranged with Bryant to get a bure built during the Jap scare. People were leaving Suva. I made arrangements for a bure at Wainadoi in case of air raids. It was built near “16” on Ex. B. It

40



was as shown on Ex. A. The bank of the river was 8-10 feet from my bure. I got my water from the river. The course of the river was as shown in red on Ex. B.—not the blue.

*In the Supreme Court of Fiji.*

I used to visit the place at weekends. I used to swim near "No. 8." Had to walk 30-50 yds. (indicated) to get there. It was a deep pool—over my head.

*Plaintiff's Evidence.*

10 In Dec. 1941 there was grass on what is marked "present excavation" on Ex. B at the Ivi tree. It was on the same level as the Ivi tree with grass and rubber trees on it. It went right up into the big bend shown at 9-10-11-12-13.

No. 7.  
Francis Seymour Whitcombe,  
14th August 1946,  
examination.  
*continued.*

The road shown past the "old dump" did not exist in 1941. The banks were too high.

Looking across towards "C" from my bure was heaped up gravel and beyond it grass land.

There was another thatched house between 17 and 18. A Fijian lived there. The stream then was just beside him. He had steps cut down to it.

I saw a couple of poles apparently used for drag lines.

20 There were heaps of gravel where the blue stream now is near "C" on Ex. B.

Was not there when the stream changed its course.

*Cross-examination.*

Did not live in the bure. Used to stay with Bryant when I went out. Visited throughout 1941-42.

Cross-examination.

Certain of my recollection.

Do not think water would have flowed across from 8 to 16.

Did not pay much attention to the river in 1942. Stopped using the swimming pool.

The gravel I saw at "C" was river gravel.

30 Have not seen the river in flood.

No. 8.

**EVIDENCE of Donald Norman Anderson.**

No. 8.  
Donald Norman Anderson,  
14th August 1946.  
Examination.

Witness : DONALD NORMAN ANDERSON, Sworn.

Born in Fiji. When war broke out I was in Vanua Levu on my father's plantation.

Then I came and joined the Fiji Artillery from which I was discharged in August 1942. After a month I got a job with the P.W.D.

Know Wainadoi. First went there end of 1942. I was at Tamavua. Also went to Wainadoi in 1943. 1942-43 Fitzpatrick was on the road.

40 When the Tamavua lorries went down Fitzpatrick told me where to put the gravel. At first we had 2-ton Bedford lorries. Later we had 2, 3 and 5-ton trucks. Took down anything up to 8 trucks.

Sometimes went every day for a week.

The gravel was for roads.

When I first went there I went to the area between 20 and 13 on Ex. B at about "C." The river was practically on the blue line. Used a

*In the  
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No. 8.  
Donald  
Norman  
Anderson,  
14th  
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1946,  
Examina-  
tion,  
*continued.*

drag line and scoop. There was a road in by the rubber store as shown on Ex. A.

Gravel was taken all round the "C" area.

It was also taken near the bamboo near the concrete bridge. Here the winch was above the road, gravel was dragged through the river and up the high bank. Winch was opposite "24" and the block at "24." In the "white" area 23-24-25 there was a fairly high bank with grass on it.

The action caused erosion of the bank.

Only P.W.D. were at "24."

I operated the scoop nearly all the way up. Worked between 10 23 and 24.

On one occasion the drag line had been operating near the intake of the sawmill water and the engine ran hot.

After we had finished at "C" we went upstream to 9 and then up to about 2.

See brown excavation on Ex. A. See the area opposite 200 × 100 ft. at 4 and 5. I took gravel from there.

Excavated both sides at 4 and 5 with shovels.

Later I was in charge of that section of road from March, 1944.

Have never seen a real flood there. Have seen freshets. 20

*Cross-  
examina-  
tion.*

*Cross-examination.*

When I came down from Tamavua I acted under Fitzpatrick's instructions.

The bucket was situated on dry ground on the opposite side.

I was in charge of taking gravel in 23-24-25. That was after I took over from Fitzpatrick.

Between 4 and 5 there was grass on the gravel. The area at the Ivi tree was hard to work easily. It was rolled hard with the traffic.

I took gravel from both sides at 4 and 5 when I was at Tamavua. Fitzpatrick did not interfere. 30

I also took gravel there later when I was in charge.

I was there one month before I took over from Fitzpatrick.

Willoughby never spoke to me about taking gravel higher up than was necessary.

I took gravel there because it was easy to get.

I was expected to do 12-13 trips a day.

Was only told to get gravel from Wainadoi river.

New Zealanders and Americans were working in that river, and Williams & Gosling.

Did not see anybody else take gravel near 4 and 5. 40

*Re-examina-  
tion.*

*Re-examination.*

There were marks at 4-5 as if gravel had already been taken from it. Didn't tell Fitzpatrick where I got the gravel.

There were a lot of lorries there and everybody was helping himself. Working with the scoop was bound to damage the banks.

CASE FOR PLAINTIFFS.

## EVIDENCE of Frank Edwin David Bradnam.

Thursday, 15th August, 1946.

## THIRD DAY.

Witness : FRANK EDWIN DAVID BRADNAM, Sworn.

Road Foreman, P.W.D.

Know Wainadoi stream. October and November, 1937, I was removing gravel there for the roads. Went on leave December and Fitzpatrick took over. Fitzpatrick was working there too while I was  
10 there.

I was taking gravel at that time from just below where the rubber house is now and also from a spot N.W. of the rubber house where there was a backwater. That gravel was fairly clean. Not covered with grass.

Beginning of 1938—January—August—I was at the Tamavua depot and Fitzpatrick was taking under me from various spots in the stream—mostly from where I had been taking.

After August 1938 I had no further dealings with Wainadoi till November 1945 when I took over from Willoughby and was in charge. Then took gravel from a bank above the sawmill on the flat above the  
20 high bank.

For road work we wanted it from 1½ in. down to fine binding. Usually taken from beds where it is fairly clean.

I have only taken clean gravel uncovered by vegetation. If the gravel were mixed with more than a little mud it would be too dirty for road purposes.

While I was taking gravel I had to stop work for flood. During rainy season the gravel beds are flooded about once a month. Areas marked "gravel in grass" as above 21 and below "C" on Ex. B would at times be under water. I have seen the grass-covered areas with water  
30 over them. This happened 25-3-46 when the water was about up to the girders of the bridge and then the flats were covered with water to the Ivi tree. Could not see beyond that. The whole bed was under water between the high banks. Water would be then within 2½ ft. of the bridge girders and that would be a rise of 5-6 feet.

Do not think the bank opposite 3-4 would be covered by a 5 ft. flood.

Have frequently seen the stream since 1938. Have seen where the spoil from the river has been put. At times it has not been altogether suitable. Have never seen any grass put on the road.

Spoil from the high banks would not be suitable for the road.

At times we have had to use a drag line to drag gravel out of the  
40 stream. Has never been necessary to dig into high banks. I have not known it done.

River might cover clean gravel deposits once a month.

At the "Island" in 1937-38 the river was flowing practically as it is flowing to-day. The "Island" was as it is to-day and the river flowing south of it.

In the  
Supreme  
Court of  
Fiji.

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Evidence.

No. 9.  
Frank  
Edwin  
David  
Bradnam,  
15th  
August  
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tion.

*In the  
Supreme  
Court of  
Fiji.*

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Evidence.*

No. 9.

Frank  
Edwin  
David  
Bradnam,  
15th  
August  
1946,  
Examina-  
tion,  
*continued.*

Cross-  
examina-  
tion.

I was taking gravel from the dead water area inside the loop. That was very clean gravel. That was 1937. We went in lorries up the main stream to the small creek and took the gravel round the edge of the water, 30-40 yards from the edge of the stream.

At one time the promontory was running from the Ivi tree to the "Island". I would say it was 90 per cent. earth including the portion where the Ivi Tree was.

When I operated a drag line it pulled the bucket up on to the high bank. It did not damage the bank—it strengthened it. The contents of the bucket would be spilling all the time. 10

Did not see what Anderson did.

*Cross-examination.*

Had nothing to do with the stream 1941-44. Not until 1945. Nothing to do with it from November 1938 till August 1945. But passed along the road once a week. On occasions have seen water from high bank to high bank—do not remember how many occasions.

Have not seen water in rubber trees but in the 1941 hurricane saw silt and debris washed across the road.

The highest point I ever worked at was about 100 yds. above the smoke house practically opposite the arrow of "170 ft." on Ex. A. That was 20 October and November 1937. Have never gone higher myself. I was not living there but I was there most days. Got the gravel then by hand shovelling. There was no road past the rubber house at that time.

In the 90 ft. area on Ex. A there was a swampy area with gravel in it. That is where the old road went. There was a definite bend in the stream there. There was a high bank and then a slope of gravel down to the water.

At the arrow point of "170 ft." there was dead water. Between that and the stream was high ground covered with grass. Took very little gravel from there. The main stream then ran approximately as it does 30 now.

Did not work in the patch marked 150 × 250. There was dead water behind that too. I took no gravel from there.

Remember Fitzpatrick had a drag line over the 150 × 250 ft. area during the war years.

The scoop would leave a definite channel.

We always take gravel for roads. We take it where we can get it. No definite instructions. We take it from the best streams available.

When I went on the Wainadoi stream in 1937 I knew who owned it. I went there because the man before me went. 40

We usually ask permission to go through private property.

Re-examina-  
tion.

*Re-examination.*

I made a mistake when I referred to the arrow point at 170 ft.—I meant 330 ft.—opposite the Ivi Tree.

*By Court :*

Have never seen the water over the bridge.

## No. 10.

## EVIDENCE of Harold Jordon Willoughby.

Witness : HAROLD JORDON WILLOUGHBY, Sworn.

Serua Road Foreman P.W.D. since 18.7.39. As such responsible for road at Wainadoi. Fitzpatrick was under me in charge at Wainadoi. It was our main source of supply of shingle.

In 1939 I was along the road three times a month, 1940-41 once or twice a month up till 1943. In 1943 gave more attention to the road. Went on leave 30.11.45.

10 Visited the gravel areas about once a month.

The gravel had to be reasonably clean. Never had cause to complain earth or grass was being put on the road.

Occasionally we took from heaps of shingle that had been drawn up on to the banks. Other times we took from the edge of the water. Never saw it being taken covered with vegetation.

In 1939 Fitzpatrick was working near the smoke house on Ex. A.

1939. At the time the stream did not go round the big bend. The river was 50-60 feet south of the Island 14-15. Just south of 13 was a big bridge crossing a drain leading to the backwater.

20 Metal was drawn up in heaps by a tractor scoop and loaded by hand on to lorries which drove up the gravelled road shown on Ex. A.

Bayly wanted to close the road except to the P.W.D. So a gate was made and erected and padlocked. We had the key. That was just before the Americans came in 1942.

Later the gate was removed.

30 Then large numbers of vehicles came in and we were crowded out—N.Z. Army and Air Force, Fiji Army, Americans, all came. They were digging gravel and taking it away. It was an uncontrolled scramble. Have seen the Fijian Army digging on high banks—remember them on the Island 14-15.

As a result we went below the bridge. Then Fitzpatrick got permission from Bayly to put in the road on the south side. Then we took gravel from the area marked 220 × 350 on Ex. A. May have been a little grass towards the high bank but apart from that it was reasonably clean.

Recently we did some work about " 6 " on the north bank and that was the highest we ever went.

Have seen Air Force trucks coming from further up the stream.

40 Some time in 1943 we were bulldozing at the dump at the Ivi Tree and we had to leave a track so that Army vehicles could get further up the river. They used to come back loaded with gravel.

When we clear a bed of shingle it generally builds up again with the flood when it comes.

Have no personal knowledge of work being stopped by floods.

Anderson was working under me at Tamavua end of 1943 and early 1944. He was sent to Wainadoi at odd times with trucks. He was told

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Supreme  
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No. 10.  
Harold  
Jordon  
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Examina-  
tion.

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Supreme  
Court of  
Fiji.*

*Defendant's  
Evidence.*

No. 10.

Harold  
Jordon  
Willoughby,  
15th  
August  
1946,  
Examina-  
tion,  
*continued.*

Cross-  
examina-  
tion.

to work in conjunction with Fitzpatrick at Wainadoi. From my monthly reports he worked :—

May 1943	..	..	1 day.
July	..	..	7 days when the trucks were being loaded with bulldozers below the bridge and at the gravel ramp near the Ivi Tree.
August	..	..	
October 1943	..	..	4 days loading by hand—do not know where.

That was all until he was transferred elsewhere.

While I was in charge I received no complaint from Bayly. Remember 10  
Bryant discussing things.

On one occasion Anderson said he wanted to take shingle from a bank further up the stream. I told him it was unnecessary. I think it was when he was there in charge.

*Cross-examination.*

First saw the stream in 1939.

When I visited the stream I might stay up to  $\frac{3}{4}$ -hour to see the work that was going on. Was never further up stream than we were the other day. Before that was never above 5 on Ex. B.

1939 went in on the Suva side on the road shown on Ex. A. At the 20  
dip marked 90 ft. I think the stream was nearer the south bank. The 220 × 170 area was shingle without grass. There was no bank at the edge of the stream.

The stream did not cut into the high bank opposite the smoke house in 1939.

The area marked 150 × 250 on the south bank has never been worked on by us. In 1941 Bryant put a pipe down and since then the stream moved further away. That area is now grass over gravel. In 1939 the stream was further south. Have seen nobody else on the area (250 × 150). On that area I have not seen any work. I have seen a 30  
hoister winch pulling gravel out of the stream on to the 220 × 170 area. The anchor block was on the south side. The anchor block would be on the 250 × 150 ft. area. The stream was then further south—flowing almost straight. Do not think the anchor block was on the high bank.

In 1939 the river was 50 ft. further south than the lemon tree.

We were only interested in the road as far as the 220 × 170 area.

Did not go further upstream than the 220 × 170 area in 1939.

As far as I can recollect the area C was shingle bed with a high point in the centre covered with grass.

At the Sirdar's house the bank was about 50 ft. further south than 40  
to-day.

As far as I remember the land continued further out than at present but I am not very clear. My work never took me out that far. The island 14–15 was there in 1939 but the stream was on the south side of it.

We only became familiar with the Ivi Tree area after the Americans came in 1942.

Williams & Gosling and the Americans got most of their gravel in the lower areas.

In 1942 the area above the Ivi Tree marked "present excavation" the high land ran out a little further. There may have been trees on it. 50  
The stream was then further south than it is now.

I never saw the stream go round 10–11–12.

Know nothing about anchor blocks near 16.

We were the only people using a hoister winch—the others were using pick and shovel.

In 1943 we took gravel round "C."

Cannot say if Fitzpatrick used a drag line near C in 1941.

We used a bulldozer with 350 × 220 area in 1943. The bank on the north side was then about 3 ft. high. Remember telling the driver not to break the bank down. The other people were working on the north side at that time. The southern bank was low shingle bed. Stream would be  
10 15–20 feet wide. Bulldozer had to back into it.

Land in the big bend now much as it is to-day except that the stream was further south.

1943 stream was much as shown in Ex. A but was further south.

The promontory went further out than the Ivi Tree in 1943. Do not know what happened to it. Not taken by us because too much silt.

We never went above No. 6 on Ex. B.

Do not remember P.W.D. operations being stopped at "B"—that is, I have no personal knowledge.

We took gravel from near the present fallen rubber tree—between the  
20 blue and red streams and between B and 6. On the south side did not work so far back as the quality of the material not so good. It was recently I took on the north bank here. Took a lot from 5 downwards in 1943. Stream was then further north.

From C downwards the stream has on the whole moved north. Above C it has moved south.

This is due to excavation but the P.W.D. are not entirely responsible.

When we went to the fallen rubber tree we were not running through water. In that area the stream has moved south.

I had not been above 6 prior to these proceedings.

30 I have seen the Army as far up as 4 on Ex. B.

Anderson told me he wanted to dig gravel higher up. He may have taken gravel from places unknown to me—if they were looking for an easy job. The gravel higher up has too much silt in it.

Remember a swimming pool before the war. Do not remember it 1940–41.

Did not see New Zealanders swimming—I know they did swim but I don't know where.

Remember Whitcombe's bure.

A great deal of gravel has been taken. We alone took thousands  
40 of yards and the others took more. Our biggest truck was 5 tons. Fitzpatrick's task would be 24 yards one day but not every day from Wainadoi.

He worked a drag line between 20 and 21. Remember the anchor block was tied to a rubber tree. I stopped him because he was endangering the high bank. That was between the 90 ft. area and the bridge. That would be between 25 and the bridge on Ex. B.

*In the  
Supreme  
Court of  
Fiji.*

*Defendant's  
Evidence.*

No. 10.  
Harold  
Jordon  
Willoughby  
15th  
August  
1946,  
Cross-  
examina-  
tion,  
*continued.*

*In the  
Supreme  
Court of  
Fiji.*

*Defendant's  
Evidence.*

No. 10.  
Harold  
Jordan  
Willoughby  
15th  
August  
1946,  
Cross-  
examina-  
tion,  
*continued.*

When we took gravel from 20-22 the anchor block would not be on high ground.

Use of the scoop should not have damaged the bank.

Ivi Tree. Before the war remember a swimming pool somewhere near the Ivi Tree.

Do not know about the anchor blocks near 16, but the drag rope must have been pulling towards C.

In 1943 and 1940 the river was flowing south of the island 14-15.

Went there with Fitzpatrick in 1939. We considered taking gravel there but decided not to.

I saw the work going on between 6 and B.

10

No. 11.  
James  
Fitzpatrick,  
15th  
August  
1946,  
Examina-  
tion.

No. 11.

**EVIDENCE of James Fitzpatrick.**

Witness : JAMES FITZPATRICK, Sworn.

Road overseer P.W.D. For 11 years have been stationed 2½ miles from Wainadoi. Have been in charge of gravel taking operations in the stream.

1944 was on leave from 11th March till October.

In taking gravel we have always followed the river bed because we want clean gravel without too much silt. The furthest I have ever been from the actual water is about 12 feet. 20

Floods—from 1935 have only seen one flood that went up to the rubber trees. That was in 1935. Other floods have only gone from bank to bank. Stopped from getting gravel by floods 6-7 times a year in the rainy season.

Have never taken gravel from places covered with grass. We followed the edges of the stream and never went on the high bank.

Last year have been taking from the river bed.

I visit the place almost every day.

There was a flood 1.1.44. Do not remember a big flood in 1942.

Remember Willoughby taking over from Bradnam (Willoughby says this was July 1939). 30

Went with Willoughby to the "Island" shortly after he took over. The river was then flowing south of the island.

At that time the promontory in front of the Ivi Tree ran out about 10 yards. It got washed away a little. My men never dug into it. Did not see anybody dig into it.

The stream has altered several times and I have always followed it.



The highest point upstream I have worked is on the north bank below the fallen Ivi Tree.

Remember Anderson coming out from Tamavua. I told him where to get gravel. He got it from the ramp by the Ivi Tree. He never went above the fallen Ivi Tree. I know because I was working there.

The Sirdar or I checked roughly the loads taken by Anderson. Figures went into the returns.

Have never taken spoil from the high banks at any time.

10 Once Bryant complained about water for the sawmill. The District Engineer came out and looked at the place where we were dragging gravel. That was in the stream where it used to run beside the sawmill. That is the only complaint I can remember.

Have never had difficulty in getting clean gravel I require from near the stream.

*Cross-examination.*

Not necessarily on the stream all day and every day.

At times used a drag scoop. Also get it by hand and by bulldozer. I cannot read a plan.

In 1939 the stream near the rubber house was where it is to-day.

20 The stream came past the Ivi Tree on the point and then came along straight. It went near where the sawmill is now.

In 1939 the island in the big bend was much as it is to-day.

First took gravel from the bridge up to the Ivi Tree.

We followed the stream and never went far from its bed.

There used to be a stream running close to the sawmill.

We got in by a road on the north side of the stream.

30 Worked with a drag line and scoop. Mostly put the anchor blocks on the gravel but would normally put the anchor block at the bottom of a high bank if there was one. Have stopped my men putting anchor blocks on top of high banks.

Do not remember having an anchor block on the high bank near the sawmill.

Never saw a rubber tree used as an anchor.

There was trouble about the water line for the sawmill. The pipe went straight into the stream into a hole.

The scoop leaves a definite channel. May go down as much as 20 feet.

Sometimes it did make a hole 20 feet deep.

If the scoop went up to a high bank it would cause erosion.

40 Remember Whitcombe's bure near the ramp. Do not remember the anchor blocks being there. I agree holes are there now.

Only the P.W.D. used drag lines.

Agree we had anchors near the Ivi Tree. The stream passed close to Whitcombe's bure and more towards the ramp than it does now—more or less like the pink stream on Ex. B.

I pulled across the stream. The tractor was somewhere by the lemon tree.

50 At the lemon tree the land went out a bit and I remember an orange tree on it. That land does not exist to-day. We had a gravel dump there.

Tractor and gravel dump were there in 1941.

*In the  
Supreme  
Court of  
Fiji.*

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Evidence.*

No. 11.

James  
Fitzpatrick,  
15th

August  
1946,

Examina-  
tion,  
*continued.*

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examina-  
tion,

*In the  
Supreme  
Court of  
Fiji.*

*Defendant's  
Evidence.*

No. 11.

James  
Fitzpatrick,  
15th  
August  
1946,  
Cross-  
examina-  
tion,  
*continued.*

Agree that I had two big dumps by the lemon tree.  
Agree a big hole was caused and the New Zealanders could swim  
in it.

Do not remember another swimming pool further up.

Bulldozed all round the Ivi Tree area. Bulldozer had one blade only.  
It made the present road up to where the ramp is.

A certain amount of land has gone from near the lemon tree.

I never took gravel in the big bend. Did not see the Army in the  
big bend.

Above the Ivi Tree the stream has only altered its course slightly. 10

Know where Whitcombe's bure was built. The stream was about  
1 chain from it.

Do not know what happened to the land beyond the Ivi Tree.

A trickle of water used to go round the island but *not* the main stream.

Had two gravel dumps near the swimming pool. Could not say if  
they were taken away by a flood in 1942.

The highest point I have taken gravel is downstream from the fallen  
Ivi Tree.

Remember Smythe coming out with a lawyer. They told me to follow  
the river edges. They told me never to go into high banks. They did 20  
not stop me in any specific spot.

Did not stop anywhere after Smythe's visit.

I do not know who cut into the bank up from the Ivi Tree so as to  
cut into the tractor track. It was not me.

Anderson was sent down to work under me. I gave the orders and  
told them where to take the gravel.

Anderson could not have taken gravel from places I did not know of.  
He never went above the fallen Ivi Tree in my time. I was never away for  
very long.

Army was up above the fallen Ivi Tree.

30

No. 12.

Indur Deo,  
15th  
August  
1946.  
Examina-  
tion.

No. 12.

**EVIDENCE of Indur Deo.**

Witness : INDUR DEO, Sworn.

Road overseer.

Worked at Wainadoi under Fitzpatrick. Worked there over six years.  
Live 2 miles away.

Was at times in charge of the men getting gravel.

The highest point at which I saw the P.W.D. take gravel was just  
below the fallen Ivi Tree. If Anderson says he went further up he is  
wrong. 40

It was part of my work to check up the loads being taken out.

Anderson did not go further up than the fallen Ivi Tree.

All the time we took gravel from the edge of the river where the  
gravel was clean. Have never seen gravel taken from the high banks.

Stream has not altered much near the Ivi Tree in 6 years.

*Cross-examination.*

Can read a plan.

I worked more on the road than on the gravel beds. Was on the stream once a week.

Was at times in charge when gravel was taken out of the stream. Drove a lorry many times.

Have seen the drag line working.

Saw it working at Nos. 24 and 25 on Ex. B. The anchor was towards the mill. That was in 1944.

10 Earlier it was Fitzpatrick's gang who operated drag lines. They operated near the rubber house.

Never saw a scoop working from the Ivi Tree.

Remember Whitcombe's bure. The river did not flow close to it.

Think the land below C came out a few feet more than to-day.

I did not check every load of gravel that came out for the P.W.D.

Anderson could have got gravel without my knowing about it.

When the Tamavua fleet went there I was sent to check and Fitzpatrick came at times and watched the work.

*Re-examination.*

20 The lorries making heaps of gravel were not checked—only lorries that removed it straight away like Anderson's.

*In the  
Supreme  
Court of  
Fiji.*

*Defendant's  
Evidence.*

No. 12.

Indur Deo,

15th

August

1946,

Cross-

examina-

tion.

Re-examin-  
ation.

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No. 13.

**DEFENDANT'S SUBMISSIONS TO COURT.**

VAUGHAN: Addresses Court for Defendant.

*Facts.*

Onus on Plaintiff to prove we by our servants have taken spoil in places which are not within the bed of the stream. Submit Plaintiff has failed.

30 Evidence conclusive that gravel not taken from "high banks" from the bridge up to the Ivi Tree. There is the place higher up from where Anderson took gravel. If gravel taken there then admit we should pay.

But submit evidence as a whole shows Anderson is wrong in his recollection.

No evidence to show river broke through from 9 to 14 in a single flood.

Where scoop was used river has receded—not advanced.

Our operations confined to edge of stream where gravel regularly covered by heavy rain and so in the "bed" of river

No. 13.  
Defendant's  
Submissions  
to Court,  
15th  
August  
1946.

## PLAINTIFF'S SUBMISSIONS TO COURT.

*In the  
Supreme  
Court of  
Fiji.*

GRAHAME : for Plaintiff.

No. 14.  
Plaintiff's  
Submissions  
to Court,  
15th  
August  
1946.

We only have evidence from 1941—Bryant.

P.W.D. had rights : (1) under Road Ordinance—Cap. 208 sec. 13—to enter and take gravel ; (2) right of Crown to take gravel from the bed of the stream.

We say they have taken gravel outside “ bed ” of river.

What was bed of stream between 1941 and 1944. “ Encyclopædia Laws of England,” Vol. 2, at p. 143. Coulson & Forbes “ Law of Waters,” 10 at p. 77.

In this river clearly defined banks. There are “ high banks ” but there are lower banks counting “ gravel in grass ” or “ gravel flats in grass.”

*Kingdon v. Hutt River Board*, G.L.R. N.Z. Vol. 7, p. 634.

Unless it is shown that flats are regularly and frequently covered by water they are not part of the stream.

Does evidence show gravel was taken from the “ intermediate flats.”

Does Crown property in bed of river entitle them to do what they like with the banks. Why gravel not taken from bed of the river covered by Roads Ordinance (Cap. 208) sec. 14. 20

Cap. 123—sec. 5—nothing there enabling Crown to remove property. If they interfere with the freehold they are responsible for damage.

Gravel taken from areas A, B, C and D shown on Ex. B.

Loss of bank at the Ivi Tree is admitted—Willoughby says it was 50 ft. further out.

Submit flood of 1942 created large new supply of gravel which they bulldozed up with lorries.

Submit new course of stream did not become property of the Crown—change being violent and precipitate.

It is not asserted by other side that gravel flat at B is bed of stream. 30 We say it is not. Gravel taken on both sides of stream at A.

Not possible in evidence to assess damage involved. Plaintiff's object is to vindicate his rights. All he wants is a declaration of his rights and to that end nominal damages.

*Hindson v. Ashby* (1896) 2 Ch. 1 at p. 25.

C. A. V.

No. 15.  
DIRECTIONS OF JUDGE.

21st August, 1946.

*In the  
Supreme  
Court of  
Fiji.*

Sir,

Civil Action No. 17 of 1944.

*Bayly vs. Attorney-General.*

No. 15.  
Directions  
of Judge,  
21st  
August  
1946.

I am directed by His Honour the Puisne Judge to intimate that he would appreciate the benefit of argument on the following questions:—

1. Does section 5 of the Rivers and Streams Ordinance (or any other  
10 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?

I am,

Sir,

Your obedient servant,

(Sgd.) B. L. GREGG,

Registrar, Supreme Court.

20

The Attorney-General,  
Suva.

---

*Friday, 30th August, 1946.*

A.-G. : Who has right to begin.

COURT : Plaintiff.

## No. 16.

## ARGUMENTS of Plaintiff on Directions of Judge.

No. 16.  
Arguments  
of  
Plaintiff on  
Directions  
of Judge,  
30th  
August  
1946.

GRAHAME : Under sec. 14 of the Roads Ordinance P.W.D. not  
30 entitled to remove gravel from the bed of a stream. Power is to take gravel from any "land" and "land" does not include the bed of a stream, irrespective of position under the Rivers and Streams Ordinance. No statutory provision relevant outside Roads Ord. and Rivers and Streams Ord.

Nature of ownership vested in Crown by sec. 5 of Rivers and Streams Ord. ?

Title of Ord.—"to define Public Rights" ?

Section 2 deals with rivers.

Section 6 defines streams.

Section 9 makes it clear that enjoyment by the public is the primary  
40 object of the Ordinance.

Crown has no right at Common Law to the bed of a stream.

*In the  
Supreme  
Court of  
Fiji.*

Crown right defined by sec. 5—not an absolute right—no right to take anything away from the bed of the stream. Agree they can use the bed for purposes of the river.

No. 16.  
Arguments  
of  
Plaintiff on  
Directions  
of Judge,  
30th  
August  
1946,  
*continued.*

Crown is a trustee for the public at large for the maintenance of the river for the benefit of the public.

Crown under a duty to prevent erosion ?

Whole Ordinance deals with uses of stream by public.

At Common Law Crown cannot enter on land to get to stream in the absence of statutory authority.

The bed of the stream is not “ land ” within the meaning of the Roads Ordinance. 10

Director of Public Works is not the Crown and is not empowered to go on Crown land. If he takes gravel from a stream which is not private land and takes it over my land he is trespassing.

(2) *Compensation under Roads Ordinance :*

Plaintiff has no claim other than under sec. 22 of Roads Ordinance against the Crown or Director of Public Works.

Effect of sec. 22—claim “ may be disallowed ” by whom ? Disallowance by Director does not disentitle Claimant to take his claim to the Courts. 20

Attorney-General has not pleaded we did not claim under sec. 22. He should have raised the question *in limine*.

In any event sec. 22 does not extinguish legal right.

No. 17.  
Arguments  
of  
Defendant  
on  
Direction  
of Judge,  
30th  
August  
1946.

No. 17.

**ARGUMENTS of Defendant on Directions of Judge.**

A.-G. : Other side did not raise question of application. No onus on me. Anyhow question now raised.

Taking sec. 14 but if sec. 22 omitted nobody would have any right so long as powers exercised lawfully. (No !)

No “ injuries ” even if damage caused by legitimate exercise of the 30 right.

No. 18.  
Reply by  
Plaintiff on  
Defendant's  
Arguments,  
30th  
August  
1946.

No. 18.

**REPLY by Plaintiff on Defendant's Arguments.**

GRAHAME : As to application of sec. 14—Crown not bound save by specific terms which do not exist here.

Submit sec. 22 does not extinguish right to compensation.

Right against Crown arises quasi ex contractu. Right against Crown cannot be assumed to flow from tort.

These proceedings the local equivalent of Petition of Right.

C. A. V. 40

No. 19.  
JUDGMENT.

IN THE SUPREME COURT OF FIJI.  
Civil Jurisdiction.  
No. 17 of 1944.

Between J. P. BAYLY LIMITED

Plaintiff

and

THE ATTORNEY-GENERAL

Defendant.

JUDGMENT.

*In the  
Supreme  
Court of  
Fiji.*

No. 19.  
Judgment,  
19th  
September  
1946.

10 The Plaintiff in this case is the owner of certain freehold land through which passes a watercourse known as the Wainadoi Creek which for the purposes of this action is admitted to be a stream. From time to time (the exact dates are not material) the Crown by its servants has removed substantial quantities of gravel from portions of the earth's surface which are within the outer geographic limits of Plaintiff's land and it is in respect of that removal that Plaintiff now asks for relief. In particular he asks (and it is to so much of his claim that I propose to confine my attention) for :—

- 20 (A) Compensation in respect of the gravel removed and damages ;  
(B) A declaration that he is entitled to such compensation ;  
(C) A declaration that the deposits of gravel from which gravel was removed are upon his land ;  
(D) A declaration that the land from which the gravel was removed does not form part of the bed of the Wainadoi Creek.

As regards the claim for compensation and damages the question arises *in limine* as to whether the jurisdiction of this Court is not ousted by the provisions of the Roads Ordinance (Cap. 208) in view of the admitted fact that all the gravel removed by the Crown which is in issue in the case  
30 was used on the roads of the Colony adjacent to Plaintiff's land.

By section 14 of the Roads Ordinance :—

40 " 14. The Director (i.e. of Public Works) . . . may dig . . .  
" take and carry away any . . . gravel . . . for the purpose  
" of . . . repairing . . . any public road . . . 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 reasonable com-  
" pensation 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."

That is to say the Ordinance gives certain servants of the Crown a right to take gravel for the purposes of maintaining roads and to go through private land to take it and at the same time imposes on the Crown an obligation to pay compensation for materials taken and damage done in the taking of them to the owner of the materials.

The question of compensation is dealt with in section 22 of the Ordinance the material portions of which read as follows :—

" 22.—(1) Every person who sustains any loss or damage by  
" reason of the exercise of any of the powers and authorities

*In the  
Supreme  
Court of  
Fiji.*

No. 19.  
Judgment,  
19th  
September  
1946,  
*continued.*

“ conferred by this Ordinance upon the Director shall be entitled  
“ to receive compensation for the same provided he makes applica-  
“ tion in writing in that behalf to the Director (i.e. of Public  
“ Works) . . .

“ (2) the amount of compensation, if the same cannot be  
“ agreed to, may be decided by arbitration . . . ”

No proceedings have been taken by the present Plaintiff under section 22 (and it is doubtful whether by reason of effluxion of time it is any longer open to him to take such proceedings) but on his behalf it was argued with much ability and persuasion that the terms of the section are merely permissive and not to be read as debarring him from asking for relief in the ordinary way through the Courts. For the Crown it was argued, with no less ability and persuasiveness, that the terms of the section are mandatory and exclude any recourse to the Courts. 10

On consideration I do not think there is any room for doubt. There is a considerable body of authority on the point, for the subject has always shown a touching desire to have his rights adjudicated upon by the ordinary Courts of the land particularly when he is in dispute with the Crown in any of its modern protean manifestations. And so far as I have been able to advise myself the voice of authority is unanimous. In the case of *Bailey v. Bailey* (13 Q.B.D. 855) Brett, M.R., said (at p. 859): 20  
“ It is an old and well-known rule of construing statutes that when a special remedy is given for the failure to comply with the directions of a statute that remedy must be followed and no other can be supposed to exist.” Again it was said by Lord Tenterden, C.J., in *Doe v. Bridges* (1 B. & Ad. 847 at p. 859), “ When an act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.” These words of Lord Tenterden were quoted with approval by the Earl of Halsbury, L.C., in *Pasmore v. Oswaldtwistle Urban Council* (1898) A.C. 387: That was a case where the appellant had sought to compel a local authority to discharge certain duties laid upon it by the Public Health Act, 1875, by seeking a *Mandamus* rather than by exercising his right under section 299 of the Act to make a complaint to the Local Government Board (as it then was). His Lordship went on to say (at p. 394): “ The words which the learned judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed; you must take your 40  
stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper Government department.”

In this present case the obligation to pay compensation to the owner of gravel taken by the Crown is created by the Ordinance and it is useless to say that such an obligation existed at Common Law because such an obligation could only exist at Common Law if the taking were unlawful and by making it lawful the Ordinance itself has swept away any Common Law obligation to pay for it. That being so I am bound to say that 50  
the principle of law as enounced by Lord Tenterden applies and that the Plaintiff must confine himself to the remedy given him by the Ordinance,



that is to proceed in accordance with section 22. So much of his claim as is for compensation and damages must fail. It is in vain that he has brought his votive offering to the altar of Themis, he should have taken it to another and, to a lawyer, alien god.

And it seems to me, too, that Plaintiff's claim to a declaration that he is entitled to recover compensation under the Roads Ordinance must also fail. In *Barraclough v. Brown* (1897 A.C. 615) it was said by Lord Watson (at p. 622): "In the absence of authority, I am not prepared to hold that the High Court of Justice has any power to make declarations of right with  
10 respect to any matter from which its jurisdiction is excluded by an Act of the Legislature." And again by Lord Herschell (at p. 620): "It would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle."

But while the Plaintiff is clearly precluded from obtaining a declaration that he is entitled to compensation it does not necessarily follow that he is precluded from asking for a declaration as to the ownership of the land  
20 on which was the gravel which was in fact taken by the Crown. The law relating to the making of declarations under the Rules of the Supreme Court, Order XXV, r. 5, was discussed by the Court of Appeal in *Guaranty Trust Co. of New York v. Hannay* (1915 2 K.B. 536) in which it was said by the Master of the Rolls (Pickford, L.J.): "The effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration." In this present case both the Plaintiff and Defendant are interested in the subject matter of the declaration asked for and I do not see that what was decided in *Barraclough v. Brown* (*supra*)  
30 stands in the way. The question was considered by the Court of Appeal in *Barwick v. S.E. & C. Railway Company* (1921 1 K.B. 187). In that case the Earl of Reading, C.J., referred to the decision of the House of Lords in *Barraclough v. Brown* and went on to say (at p. 196): "If I thought that the effect of this declaration was to exercise the function of the rating tribunals which are excluded from the jurisdiction of this Court, I should refuse the declaration; but I do not. The Court is not by this declaration exercising the jurisdiction exclusively given to the assessment committee and quarter sessions of enforcing payment of rates. Even in that case (i.e. *Barraclough v. Brown*) be it observed that Lord Watson says  
40 it is possible that their Lordships might make such a declaration if it were necessary in order to do justice. It is sufficient in the present case to say that the Court is not precluded by this decision of the House of Lords from making the declaration."

As has been said, in the present case both parties have an interest in the question of the ownership of the land and I fail to see that that question is one so exclusively within the scope of section 22 of the Roads Ordinance as to preclude the Court from making a declaration on the point one way or the other.

At this stage it becomes necessary to revert for a moment to the  
50 facts. Up to a point they are not in dispute. It is admitted that so much of the Wainadoi Creek as is concerned in the case lies wholly within the Plaintiff's land and that a considerable portion of the gravel came from

*In the  
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Fiji.*

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Supreme  
Court of  
Fiji.*

No. 19.  
Judgment,  
19th  
September  
1946,  
*continued.*

the bed of that creek. As to the balance of the gravel there is a dispute between the parties, the Plaintiff alleging that it came from portions of his land outside the bed of the creek and the Crown alleging that it also came from the bed of the creek.

As regards the gravel that came from the bed of the creek (and it is common ground that at least some of it came from there), in the absence of anything to the contrary the bed of the creek clearly belongs to the Plaintiff. The position is, however, affected by the provisions of the Rivers and Streams Ordinance (Cap. 123). The material parts of section 5 of that Ordinance read as follows:—

“ 5. All streams . . . with the bed thereof belong to the Crown to be perpetually open to the public for all purposes for which streams may be enjoyed.”

There are two possible constructions which can be put on that section. On the one hand it can be read to say that all right, title and interest in the bed of the stream are vested in the Crown and that the enjoyment by the Crown of what is so given to it is only limited (the word is used in its non-technical sense) to the extent that it can do nothing that would prevent the stream being perpetually open to the public for all purposes for which streams may be enjoyed. On that reading it would be a necessary corollary that any right, title or interest in the owner of the circumjacent land would be completely and finally extinguished. On the other hand, the section can be read as vesting in the Crown only so much of the estate in the land constituting the bed of the stream as is necessary to ensure that the stream and its bed may be perpetually open to the public but leaving so much of the estate as does not fall within that description in the owner of the freehold.

There is little room for doubt as to which of these two interpretations is to be preferred. The effect of either is to take away *pro tanto* a part of the property of the owner of the freehold, and when read with the Ordinance as a whole, to take it away without compensation. It is a well established principle of construction that “such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms” (*Commissioner of Public Works (Cape Colony) v. Logan*, 1903 A.C. 355 at p. 364) and it follows that where, as here, there are two equally available interpretations each of which takes something away without compensation that is to be adopted which takes away the less, that is to say that which leaves to the owner of the freehold so much of his estate in the stream and its bed as it is not necessary to vest in the Crown for the assurance of public rights.

The effect of the section, then, is to divide so much of any land as forms the bed of a stream notionally but not physically, that is to say certain of the rights of ownership are vested in the Crown and all that is left remains vested in the party who, apart from the section, would be the owner of the whole, in this present case the Plaintiff. The rights in any piece of land which are vested in the owner of the freehold are, of course, many and varied and it is not necessary to enumerate them here. Nor would it be necessary, if they were enumerated, to attempt a precise and exhaustive classification on the one hand of the rights given to the Crown by the Ordinance and on the other hand of those remaining to the Plaintiff. All that interests the parties here is a declaration of ownership in so far as it affects the gravel which forms part of the bed of the stream.

So long as that gravel remains *in situ* as an integral part of the bed, the Crown is clearly entitled to dominion over it to this extent, that so far as necessary to maintain public enjoyment of the stream it can prevent anyone (including the Plaintiff) from interfering with it and can itself deal with it. Subject to the ownership of that right of dominion on the part of the Crown, all the remaining right, title and interest in the land belong to Plaintiff as owner of the freehold.

*In the  
Supreme  
Court of  
Fiji.*

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Judgment,  
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September  
1946,  
*continued.*

The Plaintiff, then, will have a declaration in the following terms :  
10 “That all deposits of gravel forming part of the land described and comprised in Certificate of Title Volume IX/05 Folio 226 are upon the land of the Plaintiff subject to this that the ownership of the Plaintiff of so much of the land as forms the bed of the Wainadoi Creek is subject to the right of the Crown to exercise such rights over the bed of the said creek as are necessary to ensure that the said creek shall be perpetually open to the public for all purposes for which streams may be enjoyed.”

20 Having reached that conclusion it becomes unnecessary to consider in these proceedings Plaintiff’s claim for a declaration that certain portions of the land in question do not form part of the bed of the Wainadoi Creek and there remains only the question of costs. The action was substantially one for compensation and on that the Plaintiff has failed. The Defendant therefore must have the costs of the action generally. With regard, however, to certain of the 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, each side has to a certain extent succeeded, and so in respect of the proceedings subsequent and consequent to the Court’s request for further argument each side will pay its own costs.

(Sgd.) J. B. THOMSON,  
Judge.

30 Suva, Fiji.  
19th September, 1946.

**No. 20.**

**NOTICE of Motion for leave to Appeal.**

IN THE SUPREME COURT OF FIJI.

No. 17 of 1944.

Between J. P. BAYLY LIMITED - Plaintiff

and

THE ATTORNEY-GENERAL OF THE Defendant.  
COLONY OF FIJI

No. 20.  
Notice of  
Motion for  
Leave to  
Appeal,  
2nd  
October  
1946.

40 TAKE NOTICE that this Honourable Court will be moved on Tuesday the 8th day of October, 1946, at 10 o’clock in the forenoon or so soon thereafter as Counsel may be heard by the Attorney-General the above-named Defendant for leave to appeal to His Majesty in Council from the judgment dated the 19th day of September, 1946 ;

*In the  
Supreme  
Court of  
Fiji.*

UPON THE GROUNDS (inter alia) that the declaration in the said Judgment as to the ownership of so much of the land comprised in Certificate of Title Volume IX/05 Folio 226 as forms the bed of the Wainadoi Creek is erroneous in law.

No. 20.  
Notice of  
Motion for  
Leave to  
Appeal,  
2nd  
October  
1946,  
*continued.*

AND that the question involved is of great general and public importance.

Dated the 2nd day of October, 1946.

(Sgd.) J. H. VAUGHAN,  
Attorney-General.

To : J. P. BAYLY LIMITED the above-named Plaintiff and its solicitors, 10 Messrs. Grahame & Co.

No. 21.  
Order for  
Leave to  
Appeal,  
8th  
October  
1946.

No. 21.

ORDER for leave to Appeal.

IN THE SUPREME COURT OF FIJI.  
No. 17 of 1944.

Between J. P. BAYLY LIMITED - Plaintiff  
and  
THE ATTORNEY-GENERAL OF THE COLONY OF FIJI - Defendant.

Before HIS HONOUR MR. JUSTICE THOMSON 20  
In Chambers.

Tuesday the 8th day of October, 1946.

UPON HEARING the notice of motion herein AND UPON HEARING Mr. D. M. N. McFarlane of counsel for the Plaintiff AND UPON HEARING Mr. E. M. Prichard of counsel for the Defendant the Attorney-General of the Colony of Fiji

IT IS ORDERED that the Defendant be at liberty to appeal to His Majesty in Council from the judgment of this Honourable Court dated the 19th day of September, 1946

UPON CONDITION that the Appellant within three months from 30 the date of this order shall take the necessary steps for the purpose of procuring the preparation of the record and despatch the same to England.

By the Court.  
(Sgd.) F. G. FORSTER,  
Deputy Registrar.

L.S.

No. 22.  
RIVERS AND STREAMS ORDINANCE.  
Cap. 123.

No. 22.  
Rivers and  
Streams  
Ordinance,  
Cap. 123.

FIJI.



1945 REVISION.

CHAPTER 123.

RIVERS AND STREAMS.

CAP. 123.

Ordinances  
Nos.  
2 of 1880  
(1924 Ed.).  
10 of 1925.  
2 of 1945.

AN ORDINANCE TO DEFINE THE PUBLIC RIGHTS IN THE RIVERS AND  
STREAMS OF THE COLONY. [11th March, 1882.]

- 1. This Ordinance may be cited as the Rivers and Streams Ordinance. Short Title.
- 10 2. All waters in the Colony which the natives have been accustomed to traverse in takias or canoes, whether the same be navigable for vessels built on the European model or not and whether the tide flows and reflows in the river or at the particular part thereof navigable by takias or canoes or not, which are hereinafter styled rivers, and also those waters which are included by the term rivers by the law of England, shall with the soil under the same belong to the Crown and be perpetually open to the public for the enjoyment of all rights incident to rivers. What waters shall be open to the public.
- 20 3. The banks of the said rivers to the breadth of twenty feet from the ordinary water-line in the wet season and the highest spring tide shall be subject to an easement in favour of the public for all purposes necessarily incident to the free use of the river. Easement on the banks thereof.
- 4. The provision in the preceding section shall not be construed as impairing the public right in any path or right of way along the said banks to a greater breadth than twenty feet where any such right existed prior to the passing of this Ordinance or which hereafter may be created, nor shall it be construed so as to limit the power of the Crown to take any greater breadth of adjacent land for the construction of public highways for land traffic under any reservations in Crown grants or by virtue of any Ordinance or otherwise. Public rights of way already existing or powers of Crown not to be affected by preceding section.
- 30 5. All streams whether forming the affluents and feeders of rivers and streams or themselves flowing directly to the sea with the bed thereof belong to the Crown to be perpetually open to the public for all purposes for which streams may be enjoyed. What streams shall be open to the public.
- 6. The upper courses of rivers above the portions navigated or navigable by takias or canoes shall be considered as streams for the purposes of the preceding section. Upper courses of rivers to be deemed streams.
- 40 7. Proprietors of land or towns and villages or inhabitants adjacent to rivers or streams shall not only have the fullest enjoyment of the same as part of the public but they may also be granted permanent or temporary rights by the Governor in Council to lead off for purposes of irrigation or driving machinery or supplying the mansion house, garden or cattle troughs or other uses beneficial to their property of such portion of water as may be agreed on, the water remaining after the special purpose is served, Persons living near rivers shall have same rights as public and may be granted other rights.

No. 22.  
Rivers and  
Streams  
Ordinance,  
Cap. 123,  
*continued.*

Where temporary  
water-rights may  
be granted.

for which the water-right is granted being in all cases restored to the river, stream or water-course.

8. In seasons of drought a temporary water-right of the nature described in the preceding section may be allowed by the District Commissioner of the district to any proprietor adjacent to the river or stream upon such terms as he may think proper, but no such temporary right shall exist for a longer period than one year and the granting thereof shall be reported by the District Commissioner without delay to the Governor.

Individual rights  
to be subordinate  
to the preservation  
of public rights.

9. In the granting of such permanent or temporary water-rights due regard shall be paid to the wants of other proprietors and of towns, 10  
villages or residences on the banks of such river or stream lower down than the property for which the water-right is prayed for, any private right or benefit to be deemed secondary and subordinate to the public use of the river or stream.

Application to  
be made to the  
Governor in  
Council for  
authority to erect  
wharves etc.

10. Where any proprietor or lessee of land adjacent to any river desires to establish a wharf, pier, landing-place or any building or erection of a permanent character for the purposes of his property upon the bank within the extent of the twenty feet mentioned in section 3 hereof or wholly or partially within the waters of such river so as to interfere with or encroach on the free public right thereto or to the easement of the banks 20  
of rivers hereinbefore provided for, an application shall be made to the Governor in Council praying for authority so to do and the applicant shall advertise such application at least once in the Gazette and at least twice in one of the local newspapers circulating in the district.

Governor in Council  
may grant or  
refuse such  
application as the  
case may be.

11. The Governor in Council after hearing the applicant and any person opposing the granting of the authority prayed for and after any further or additional intimation which may seem desirable, may grant or refuse such authority as shall seem meet with a due regard to the encouragement of private enterprise, the public necessities and convenience and the preservation of the public rights in such rivers. 30

Application if  
granted to be  
forwarded to  
Registrar-General  
for registration.

12. When any such authority has been granted by the Governor in Council it shall be the duty of the Clerk to the Council to transmit the application and all the documents, sketches, plan or diagrams together with a note of the decision of the Governor in Council thereupon to the Registrar-General who shall immediately enter a record thereof in a register to be styled the "Register of River Rights." When such authority has been granted it shall be conclusive in all questions which may thereafter be raised in any court of law as to the right of the person to whom authority has been so granted as between himself and other riparian proprietors or other proprietors or members of the public whomsoever. 40

Provisions of this  
Ordinance not to  
extend to rivers  
and streams in  
certain cases.

13. The provisions of this Ordinance shall not apply to any river or stream which rises, flows and falls into any other river or stream or into the sea wholly within the island or property belonging to a single proprietor which, unless the same be navigable in the meaning of the law of England, shall not be subject to the public rights and uses by this Ordinance recognized and defined; but, if the said island or property shall at any

time hereafter be divided among more proprietors than one so that the river or stream shall cease to flow wholly through the property of the one proprietor, or if towns, villages or residences be established on the banks of any such river or stream, then the same shall cease to be excepted from the provisions of this Ordinance and the law applicable to other rivers and streams of the Colony shall be applicable thereto.

No. 22.  
Rivers and  
Streams  
Ordinance,  
Cap. 123.  
*continued.*

14. Authorities under section 10 when granted in connexion with any property and rights to water shall not be of the nature of personalty but shall be real rights attached for the time they are granted to the property  
10 or residence in respect of which they are given, and in all transfers, transmissions and certificates of title of the lands they may be referred to after the description of the lands and by reference to the entry made thereof in the Register of River Rights as transferred or transmitted with the lands themselves, and all transfers and transmissions of river rights shall be duly recorded in such register.

Authorities under  
section 10 not to be  
of nature of  
personalty.

15. The Registrar-General shall charge the fees set forth in the Schedule hereto annexed.

Fees.

Schedule.

16. When a right to water has been granted which cannot be conveniently enjoyed by the grantee unless he have power to take the  
20 quantity of water granted at a point higher up the river than the property or residence in respect of which the grant is made, the grantee shall have the right to the easement of taking the water in pipes or otherwise under or above the surface as may be arranged with the proprietor of the lands above through the properties of such proprietors as may lie between the property or residence in respect of which the water has been granted and the point at which the water may be most beneficially taken from the river for the purpose for which it is granted. Any dispute or difference in relation to the mode of taking the water or the point from which it may most beneficially be taken shall be determined by the Director of Surveys.

Grantee of  
water-right to  
have right of  
easement on  
adjoining lands  
where necessary.

17. The Governor in Council in granting a water-right shall describe and define it either by the size of the pipe through which the water is to be carried or the number of cubic inches of water per hour which is granted or by any other more improved method which may be in use for the time being for defining such right, and the dams, works, apertures or pipes necessary for the carrying off of the definite quantity granted shall be executed under the direction of the Director of Surveys.

Water-rights to be  
described and  
defined.

18.—(1) The District Commissioner of each district may appoint  
40 River Boards within such district to consist of three persons who shall have power to make regulations subject to the approval of the Governor in Council and not inconsistent with this Ordinance or any regulations made under the Marine Board Ordinance or the Harbour Ordinance generally for the maintenance of facilities for traffic and the safety of traffic upon rivers and streams and may prescribe penalties for the breach thereof. (*Added by 10 of 1925, s. 2 and amended by 2 of 1945, s. 12.*)

River Boards.

Cap. 200.  
Cap. 202.

(2) Every such River Board shall in the month of January in each year render to the District Commissioner a brief annual report together with the accounts of the Board for the preceding year. (*Added by 2 of 1945, s. 12.*)

No. 22.  
Rivers and  
Streams  
Ordinance,  
Cap. 123,  
*continued.*

SCHEDULE. (*Section 15.*)

	£	s.	d.
Registering authority for wharves etc. under section 10 and first certificate or certified copy of register .. ..	3	0	0
Registering water-rights granted under this Ordinance and first certificate or certified copy of register .. ..	0	10	0
Search of register .. .. .	0	5	0
Subsequent certificate or certified copy from register showing existence of authorities and water-rights .. .. .	1	0	0
Registering of transfer or transmission of water-rights ..	0	10	0
Certified true copy.			10

B. L. GUNN,  
Registrar Supreme Court.  
21/11/46.

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PLAN  
Showing Portion of  
THE WAINADOI STREAM

And Adjacent Features

As they appeared on the 16th Day of February 1944.

District of Veivalulua . . Province of Namosi

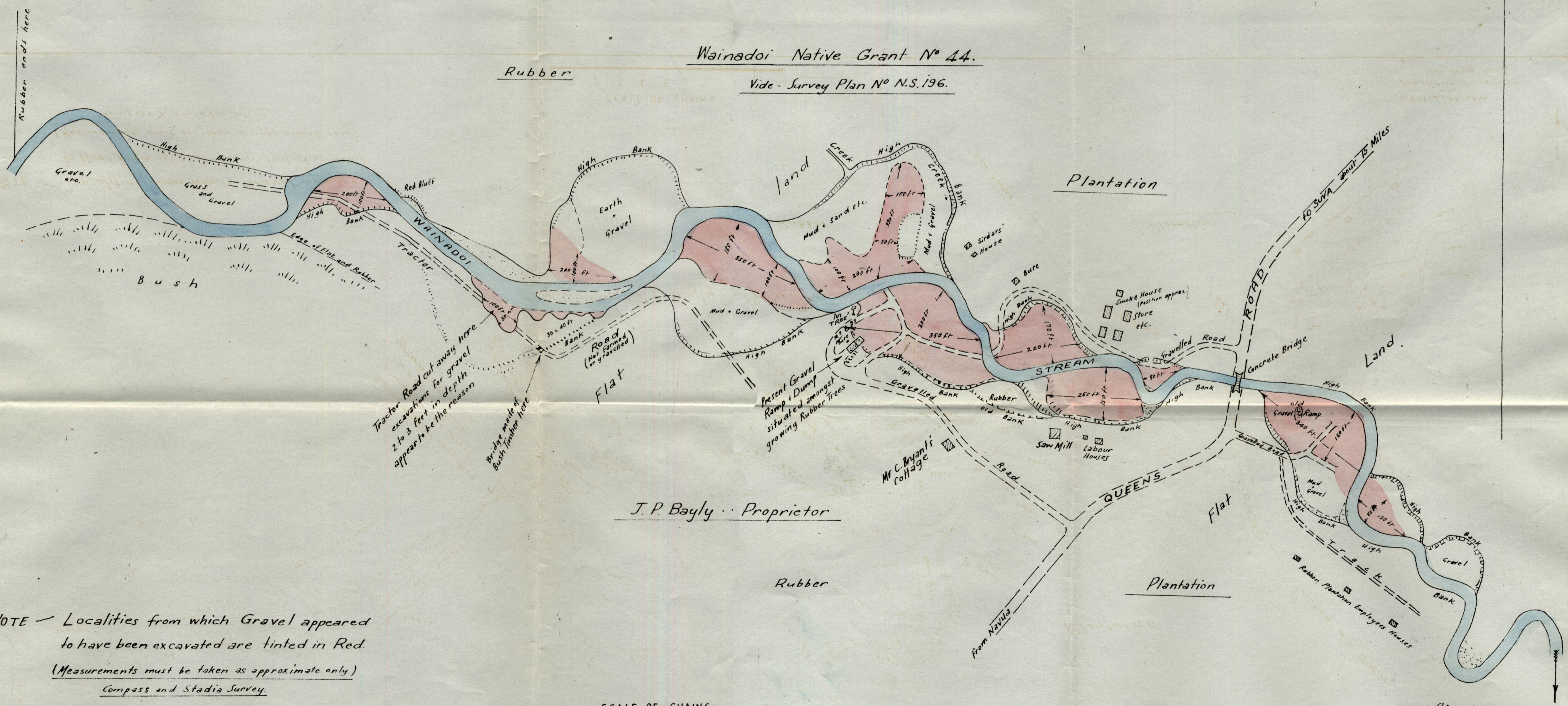
Mag North

Wainadoi Native Grant No 44.

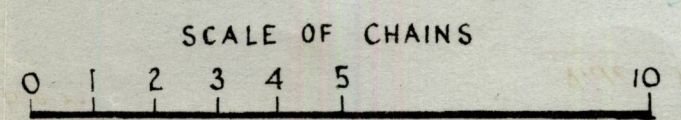
Vide - Survey Plan No N.S. 196.

Rubber

Plantation



NOTE - Localities from which Gravel appeared to have been excavated are tinted in Red.  
(Measurements must be taken as approximate only)  
Compass and Stadia Survey.



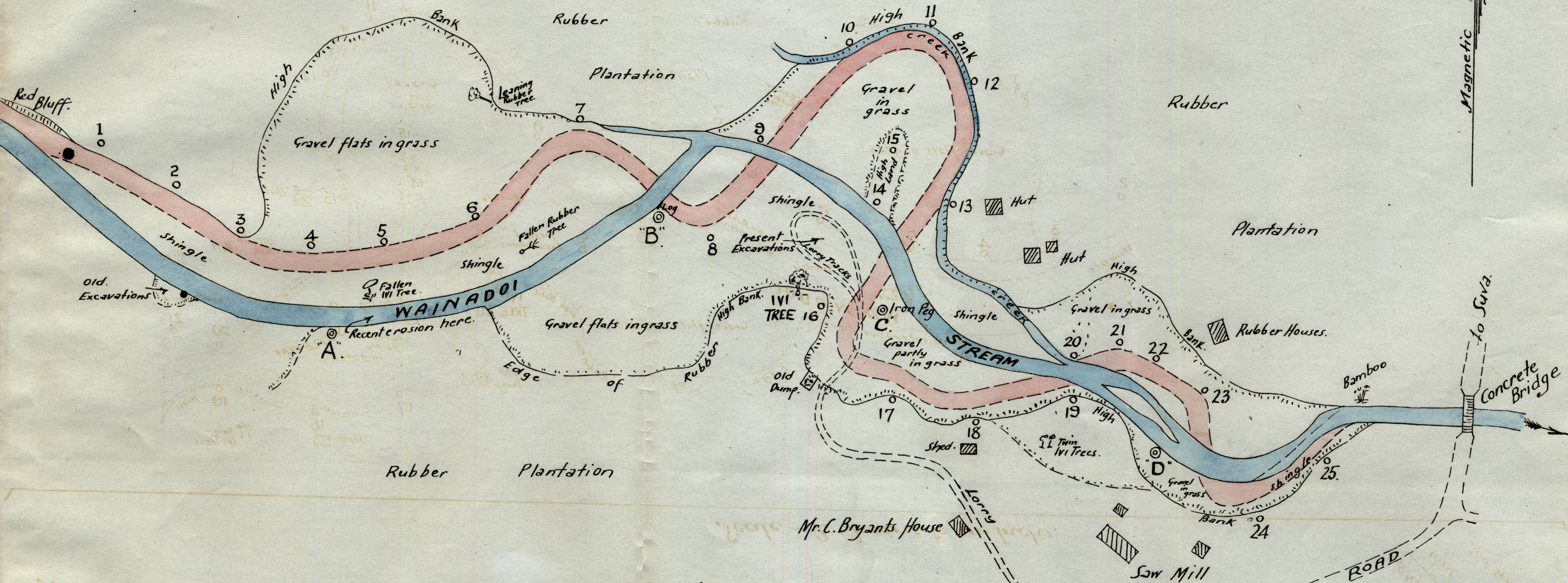
H. W. Whittaker  
Registered Surveyor  
20th Feb 1944.



B

Plan No 2

Plan showing  
 Part of the Wainadai Stream  
 As it appeared on the 17th. of April 1946.  
 In relation to its position in <sup>August</sup> ~~October~~ 1940.  
 As indicated on the ground by Mr. C. Bryant on the 17th. April 1946.



The course of the Stream on 17th. April 1946 is shown in Blue Colour.  
 The course of same Stream in <sup>August</sup> ~~October~~ 1940, as indicated on the ground  
 on the 17th. April by Mr. C. Bryant is shown in Red Colour.

Numbers indicate stakes set in ground under the direction of Mr. C. Bryant.  
 Measurements were taken with Compass and Stadia and are approximate only.

Scale ~ 2 Chains to an Inch.

A. Whitaker  
 Regd. Surveyor.  
 23rd April 1946.