

Part 1
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ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION)

SUMMARY OF PROCEEDINGS WEDNESDAY, 22 OCTOBER 1975.

1. Before the main business of the day began Mr Rattee (BPC junior Counsel) brought up a small matter arising from the view of Ocean Island at which he was present, concerning the location, age, and condition of certain coconut trees.
2. Mr Macdonald, (Counsel for the Banabans) then made an application for a change in the agreed order of final speeches. He said that since the Attorney-General had invited the Judge to visit Rabi, the Crown had in effect called evidence and, following the normal rules of procedure, was no longer entitled to have the last word on the facts. A ruling on this application was deferred until the following morning in order to give Counsel for the Crown time to consider the matter.
3. Mr Browne-Wilkinson (BPC Counsel) then resumed his summing up which had been interrupted by the long vacation. He put forward arguments to show that the land known as Rakentai which the plaintiffs claim was wrongfully mined by the BPC was not in fact in the area where over-mining had taken place, but elsewhere, and that in consequence the owner of the over-mined land, if there was one, had no claim in the present action. As the land in question was "fringeland" on the edge of the pinnacle belt it was possible that no Banaban could in fact prove ownership.
4. Mr Browne-Wilkinson went on to say that prior to the marking with pegs of the boundaries across which over-mining was alleged to have taken place, both the BPC and the Banabans understood that all the remaining phosphate land in that area had been leased. The boundary marking was not essentially to de-limit the mining area but to enable payments for surface rights to be calculated. The real boundary, the one implicit in the agreement, lay along the stony and unworkable ground, but for practical reasons the boundary pegs had been placed within this limit. In mining across the marked boundary BPC were not mining wrongfully,
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since they were entitled to mine all the remaining phosphate. They would, of course, be liable to pay for the surface rights of the over-mined land but they should not be liable for damages in respect of trespass and/or wrongful mining. Mr Browne-Wilkinson then pointed out that under the Statute of Limitations the plaintiffs are not entitled to bring an action for "conversion" (i.e. removal of the phosphate) if six years have elapsed since the alleged over-mining occurred, unless there have been "concealment by fraud", in which case the six years will run from the date at which the fraud was discovered or might with "reasonable diligence" have been discovered. Mr Browne-Wilkinson argued that the activities of BPC had at no time been deliberately concealed from the Banabans, that the nature of their activity (i.e. opencast mining) was not itself "secret" or hidden (as for example subterranean mining might be) and that the BPC were under no legal obligation to bring their activities to the attention of the Banabans. The day ended with Mr Browne-Wilkinson trying to establish what constituted "reasonable diligence".

Pacific Dependent Territories Department
Foreign and Commonwealth Office