# Title to Land in the Trust Territory of New Guinea

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Australia has administered the Eastern half of New Guinea and its adjoining islands since the early part of this century. The southern portion of it, known as the Territory of Papua, had first been under British administration. After the establishment of the Commonwealth it was, in 1906, placed under the administration of Australia.[1] The northern portion over which Germany had in 1884 proclaimed a colonial protectorate[2] was placed under Australian military administration in 1914. After the end of World War I this portion was entrusted by the League of Nations to Australia under Mandate. The Covenant of the League of Nations, together with the terms of the Mandate, set out Australia's international rights and duties as mandatory power. Australian civil administration was established in 1921.

With the foundation of the United Nations at the end of World War II the mandate system was replaced by the trusteeship system. As a result, since 1946, Australia's international rights and duties over the trust territory of New Guinea have been determined by the provisions of Chapter 12 of the United Nations Charter and by the terms of the Trusteeship Agreement between Australia and the United Nations.[3] The trust territory comprises, in addition to the former German portion of the island of New Guinea, all the former German islands south of the Equator, other than the islands of the Samoa group and the island of Nauru;[4] the most important of these islands are New Britain, New Ireland, Manus, and the northern Solomon islands such as Buka and Bougainville. This is the "trust territory" with which Australia's international commitments are linked. Under article 5 of the Trusteeship Agreement Australia was granted the right to bring the territory into a "customs, fiscal or administrative union or federation with other dependent territories under its jurisdiction or control". In exercise of this right the Commonwealth brought the trust territory into an

1 *Commonwealth Year Book* 1964, p. 122.

2 In German legal language the area was called a "protectorate" (*Schutzgebiet*). However, in fact it was treated in the same way as a colony.

3 The Agreement will be found as a schedule to the Papua and New Guinea Act 1949. It was approved by the General Assembly on 13 December 1946.

4 Samoa was placed under New Zealand mandate, and Nauru under joint U.K.-Australian-New Zealand mandate. The former German islands north of the Equator were placed by mandate under Japan as mandatory, and became, after 1945, U.S. trust territories.

administrative union with the Territory of Papua in 1949.[5] The two territories have since been jointly administered under the name of the Territory of Papua and New Guinea,[6] although Australia's obligations as trusteeship power attach only to the trust territory of New Guinea.

In its position as mandatory and trusteeship power, Australia may, with regard to its international obligations, have had an easier task in early decades than other such powers.[7] Today the determined attempt to bridge the gap between Stone Age civilization and modern statehood is something unique. In a country where the use of land is the vital sector of the economy, clarity and security of rights over land is essential. It is in this field that the preservation of native custom, which the trusteeship power is bound to promote, may easily conflict with the new economic policy. This is the policy of granting rights to individuals or groups prepared to plant and exploit marketable crops. Economic experts advise its adoption as essential. In addition, the trust Territory of New Guinea is faced with the unique problem which the destruction of the titles office records by enemy action during World War II created. Restoration of titles was provided for by legislation, but the question whether destruction of the original titles had revived the original customary native land rights became a subject of vital concern. This was settled by the High Court of Australia only in November 1964.[8]

The land area of the Territory of both Papua and New Guinea is over 183,000 square miles. This is about twice the size of Victoria and half the size of New South Wales. More than half of this area lies in the trust territory. The size of the population is not fully known, but including communities whose membership can only be estimated, the population of both Papua and New Guinea is estimated to be little more than two million.[9] Population increase is fast, and by 1980 the number of people is expected to reach 3½ million.[10] However, in view of the size of the land this is by all standards a small population. The intractable problems which scarcity of land and overpopulation created in other parts of the developing world are therefore absent. However, the distribution of the population is most uneven. In the western district of Papua, which covers some 22 per cent of the combined Territory of Papua and New Guinea, the population density is 1.7 persons per square mile. By contrast, the eastern highlands district

5 Papua and New Guinea Act, No. 9 of 1949.

6 Papua and New Guinea Act, ss. 9, 10.

7 Australia's grant-in-aid to the mandated territory was much less than Germany's had been. For criticisms, see W. J. Hudson's "Australia's experience as a mandatory power", in *Australian Outlook*, vol. 19 (1965), p. 35, especially pp. 40-4.

8 *Custodian of Expropriated Property v. Tedep*, (1965), 38 A.L.J.R. p. 344.

9 *Commonwealth Year Book* 1964, pp. 122, 128.

10 These estimates are based on the two most important recent international reports. The first is the U.N. Visiting Mission Report of 1962 (T/1604), which will hereafter be referred to as "Foot Report". The other is the Report of the Economic Survey Mission to the territory organized at the request of Australia by the International Bank for Reconstruction and Development, published in 1964; it will be hereafter referred to as the "International Bank Report".

in the Trust Territory of New Guinea with an area of less than 4 per cent of the combined land area carries a population of 51 persons per square mile. In smaller portions of this area, such as the Chimbu region of the highlands, the population density goes up to 500 per square mile.[11] In the Gazelle Peninsula near Rabaul, settlement is also very close, though the area itself is limited in size. It was land in this area which formed the basis of the dispute which came before the High Court of Australia in the recent *Tedep Case.*

There are good reasons for this uneven distribution of the population. Nature has not made communications easy. The major proportion of land lies on the island of New Guinea. The massive mountain ranges of that island, with their steep cliffs and gorges, leading down to swampy plains, bar any easy approach. The main centres of population in the highlands were not reached by white people until the 1930s. Even today communications present special difficulties, and wide areas are served only by aircraft. The difficulties of communication in the island may help in understanding why until recently the population has remained isolated and divided to such an amazing degree. It is a fact that the people have lived, and many of them still live, in small pockets, each group speaking its own language and having its own customs. Their numbers are well over 500, or—according to recent estimates—even 700.[12] Their sizes vary greatly, but some consist of only a few hundred people, and a case was reported recently where a tribe whose members were accused of killing the member of another tribe was so small that no one could be found who could understand and translate their language. The attitude of the native inhabitants has generally been one of hostility towards others. Without doubt, the attitude of inhabitants of coastal areas has been more advanced, probably as a result of their ease of communication and their early contacts with Europeans. However, in the words of the Foot Report, "it is this division of the population into small groups, until recently feuding and fighting amongst themselves, which has presented the principal problem of New Guinea—the problem of creating a single people with a common purpose".[13]

The principle which both the Australian and German governments recognized with regard to rights over land in Papua and New Guinea was that the rights of the native people were to be recognized. As Mr. Paul Hasluck, now Minister for External Affairs and then Minister for Territories, said in the Australian House of Representatives on 7 July 1960: "Respect for native land ownership was laid down as a basic principle of administration in Papua over 80 years ago. In Papua from the beginning, and in New Guinea since it was placed under mandate to Australia after the First World War, successive Australian Governments have strictly adhered to that principle."[14]

11 International Bank Report, p. 5.

12 International Bank Report, p. 8. H. C. Brookfield, in "New Guinea and Australia" (Australian Institute of Political Science, Sydney, 1958) p. 24.

13 Foot Report, p. 4.

14 ibid, p. 8.

Also in German New Guinea native land rights had enjoyed protection. At the same time the New Guinea Company had, in 1885, been granted the exclusive right to occupy and dispose of ownerless or vacant land, and to conclude contracts with natives with regard to land and rights over land.[15] From 1899 on, when the German Empire resumed full rights of administration over New Guinea from the Company, these rights were vested in the Imperial Administration.[16] Yet in connexion with the transfer of all sovereign rights to the Empire, the Company received the right to acquire a large area of land directly from native persons.[17] The last two years of German control brought a period of strong demand for land by German settlers. This was the 1912-1914 period when the Administration offered small settlers with one year's local experience property rights over up to 150 hectares at a nominal price, the administration meeting the cost of survey and transfer.[18] At the time when Australian military occupation of German New Guinea began, in all 700,000 acres were estimated to have been alienated from native control. However, a large proportion of this alienation appears to have been by way of lease, and not by transfer of ownership, for the latest *Commonwealth Yearbook* gives the figure for non-indigenous persons owning land in the trust territory as slightly over ½ million, and the land owned by them as about 0.9 per cent of the land area.[19] Even if the 0.6 per cent leased from the Administration is added, the foreign-held proportion of the land amounts to only 1½ per cent. In itself this is a small proportion, although this land is normally in the richest areas, and closest to transport.[20]

Two basic difficulties face the establishment of rights over land in Papua and New Guinea: one is the absence of ownership in individual indigenous persons, the other is the vagueness of customary land rights. As to the first, one of the best informed Germans, A. Hahl, then Imperial judge and later Governor of New Guinea, reported in 1897, after a long expedition through the Gazelle Peninsula of New Britain, that the head of the family there acted as if he were the owner of the land. "However, family members are entitled to free use of the land, and select plots for their plantings as they please. In contracts of sale with Europeans the heads of the family do not walk over the land alone, but in company with the most respected male members of the group. Strangers who wish to start planting in the area of a family have to pay compensation, a rental in form of a

15 Grant to New Guinea Company of 17 May 1885, *Deutsche Kolonial-Gesetzgebung* (Berlin, 1893), vol. I, p. 434.

16 Under German Law it was the Administration in its capacity as "Fiscus" in which all rights were vested.

17 German Imperial Ordinance 27 March 1899, ibid., vol. IV, p. 50.

18 C. D. Rowley, *The Australians in German New Guinea 1914-1921* (M.U.P., 1958), p. 89.

19 *Commonwealth Year Book* 1964, p. 129.

20 Ibid., pp. 89-90.

'tabu' for the use of the land. The right to work the soil then lasts for the whole duration of the period of growth and terminates with its end".[21] Hahl stressed that rights over land were only recognized in so far as there had been cultivation. A special law applied to coconut palms. They belonged to him who planted them, even on land of a total stranger, as long as the latter did not object to the planting. The owner of the land could not object to a removal of the coconuts. This was described as a generally recognized custom.[22] Today the absence of individual ownership is clearly noted in all reports on the systems of customary land holdings.[23] Like in other parts of the non-Western world the concept of individual ownership is unknown to New Guinean indigenous land holding. Generally, land belongs to the extended family or clan. However, there is no uniformity of indigenous rights of land use, as the rights often vary from village to village, and area to area. The rights the individual clan member may acquire are normally only land use rights based on occupation, on clearing and on cultivation. His rights are restricted to arable land; open grassland and forest is claimed by the group and would be available to all its members.[24] Again there is a bewildering variety of inheritance rights, many groups following the patrilineal system, others the matrilineal. Communication between groups which until recently had been rare and often resulted in bloodshed is only a development of the last generation. The pacification and rapid development of the country is bound to affect land use customs which are likely to become more uniform and general.

So far the attempt to establish a system of recorded titles granted to indigenous people under their tribal custom does not appear to have met with the expected success. The body which was set up for that purpose was the Native Lands Commission which was first established in 1952. Its task was to inquire into, and record, rights given by native custom. However, two unexpected difficulties were met. Firstly, the inquiries to determine what right of ownership, occupation and use existed were in fact much more complex than had been anticipated. It was realized that it would take probably generations to register the whole of the land in the territory. Secondly, more thorough research disclosed that the translation of indigenous customary terms into Western legal terms might often be misleading.[25] Under these circumstances, the Administration finally decided to merge the Commission's task with the general task of the Land Titles Commission.[26]

21 "Rechtsverhaltnisse und Rechtsanschauungen der Eingeborenen", in *Nachrichten für und über Kaiser-Wilhelmsland und den Bismarck-Archipel*, vol. 13 (1897), p. 68, at 82.

22 Ibid., at pp. 82-3.

23 International Bank Report, p. 10; Foot Report, pp. 5, 15, 17; Rowley, *loc. cit.*, p. 89; *Commonwealth Yearbook* 1964, p. 117.

24 International Bank Report, p. 170.

25 Land Titles Commission Ordinance 1962 which came into operation in May 1963. See *Commonwealth Yearbook* 1964, p. 118.

26 Foot Report, p. 17; International Bank Report, p. 171.

The Land Titles Commission has much wider powers than the Native Lands Commission, for it also deals with investigations into rights over land held under native custom, and ownerless land, which the Administration proposes to acquire. The difficulties of determining in a specific case what native custom recognizes as rights is vividly illustrated in an example from the Garia, dealing with the patrilineal land a man may be entitled to: "his patrilineal strips (bearing his own patrilineage names) which he inherits from his father, strips of his mother's patrilineage lands which he has acquired from his mother's brother, and strips which his father, father's father, and father's father's father acquired from their respective mother's brothers, and which he inherits together with patrilineage strips. Secondly, there are the corporate guardian rights of the patrilineage over all the land strips and blocks which bear its name".[27]

Respect for indigenous customs, their preservation and their transformation into a more contemporaneous system of land tenure had always been regarded as a challenge for the mandatory and trusteeship power. Yet, neither the United Nations Charter nor the Trusteeship Agreement lays down any rigid rule. Australia has, under Article 8 of its Trusteeship Agreement to "take into consideration the customs and usages of the inhabitants of New Guinea and respect the rights and safeguard the interests both present and future of the indigenous inhabitants of the Territory... ". It appears to be a forbidding task to try to unravel the involved tangle which land custom in New Guinea represents for individual indigenous clan members. Recording of titles presupposes a full inquiry into native custom which, in view of the doubtful bases of claims, can often not be attempted successfully. Even in countries where indigenous custom is much more general, more sophisticated, and more easily accessible, such as in many parts of Indonesia, its transformation into a system of recorded titles has faced great difficulties.[28]

However, in addition, in New Guinea the preservation and gradual recording of customary land rights faces another vital problem. This applies to the kind of land use. The customary land rights are the product of a type of agriculture which has been common until recently, and still subsists in most parts of the country. They are appropriate for a community engaged in hunting, food gathering and short-term cropping, but are unsuitable for the introduction of tree crops and other cash crops of a perennial nature.[29] The reason is

27 P. Lawrence, *Land Tenure among the Garia* (Social Science Monograph No. 4, Australian National University). See also the case quoted from Hanuabada, near Port Moresby in Papua, by Brookfield, *loc. cit.*, p. 54.

28 This is the major reason why the Indonesian Basic Agrarian Statute (Undang undang pokok agraria) of 1960 with its far-reaching conversion of customary land rights into recorded titles has so far been applied only to such a limited extent.

29 International Bank Report, p. 170; Foot Report, p. 17; *Commonwealth Yearbook* 1964, pp. 117-8.

that the customary land use rights may not give the right to plant and harvest the proceeds of such crops. Yet it is the planting of tree crops such as coffee, cocoa and copra which has emerged as the most important economic activity in which indigenous New Guineans engage in ever growing numbers.[30] Even the recording of customary land rights would normally not be fully helpful, unless the holder of the customary right can acquire from his clan also a more permanent right than custom usually allows.[31] As the recent International Bank Report notes, the customary land system is "quite unsuited to the rapidly emerging commercial farming scene, which needs the assurance of permanent use rights by individuals to specific areas of larger size than needed for subsistence gardens".[32] In some parts of the country such acquisition may be possible as the result of a kind of sale by all the members of the clan. According to the International Bank Report, arrangements between indigenous individuals and their villages and clans "for the continuing use of land" upon which such perennial tree crops can be planted are becoming more frequent.[33] This does not appear to give the individual a recordable title but would probably meet his economic aim, as long as such arrangement would also be regarded as sufficient security by a co-operative or government lending organisation. In any case, the Mission strongly recommended support of the scheme. At the same time it was realized that for modern agricultural projects the participation of European planters would remain of decisive importance. For their needs land leases should be made available, not only over Administration land but, in certain cases, also over land owned by indigenous people. Such leases, the Report stressed, should be limited to 30-35 years and carry improvement clauses.[34]

Freehold titles in the Territory of New Guinea generally go back to the German period, especially to the time of the New Guinea Company administration (1885-1899). A "Grundbuch" system of land registration for New Guinea was introduced in 1887.[35] An Imperial Ordinance of 1902 then provided a Grundbuch system common to all German colonies.[36] Under the laws of 1887 and 1902, the system was based on that of Prussia, then the most prominent part of Germany. The latter was one of the most advanced civil law systems of land registration and transfer. The system did not give the registered

30 For difficulties, see Mr Hasluck's examples in Foot Report, p. 17.

31 D. P. Derham, "Law and Custom in the Australian Territory of Papua and New Guinea", *University of Chicago Law Review*, vol. 30, p. 495, at 503 (for sale among the Tolais).

32 International Bank Report, p. 33.

33 Ibid.

34 Ibid.

35 On the Grundbuch under the land legislation of 1887 see *Deutsche Kolonial-Gesetzgebung*, vol. I, p. 469.

36 See Ordinance of 21 November 1902 and Regulations of 22 July 1904 (*Deutsche Kolonial-Gesetzgebung*, vol. 6, p. 4 and vol. 8, p. 157).

proprietor quite the same protection *qua* indefeasibility which the Torrens system does. However, reliance on the "public faith" of the register was protected. Legislation introduced in the Territory in 1921, after it was placed under Australian civil administration, provided for conversion of the old German titles into freehold titles under a Torrens title system. The Laws Repeal and Adopting Ordinance 1921 provided for the continued operation of German law regarding rights earlier acquired under that law.[37] To deal with property held by German nationals, the Expropriation Ordinance introduced, in line with the provisions of the Treaty of Versailles, machinery for the expropriation of their New Guinea property and its vesting in the Administration.[38] The conversion of titles into the newly introduced Torrens system titles was then provided for in the Lands Registration Ordinance.

A basic part of this legislation was a careful investigation of any claims, especially indigenous customary claims, opposed to such registration.[39] Such investigation had to be carried out irrespective of any earlier investigation which the German authorities had made prior to their grant of title.[40] With regard to properties which, as German-held, were to be expropriated, it was the aim of the Administration, which had created the office of Custodian of Expropriated Property, to have such properties registered in the name of the latter, and then have them sold by auction. In the years 1926 and following, most of the German properties were disposed of in this way. In many cases the purchasers bought on terms, and the properties remained registered in the name of the Custodian. The sudden destruction of the Titles Office records by the Japanese early in 1942 caused unexpected difficulties. One of the main reasons for this was that in many cases also the duplicates of the title certificates were lost in the course of the war, as the Territory was overrun by the Japanese and later formed one of the major battle areas. Special legislation was required to provide for a restoration of the certificates of title. This was done in ordinances culminating in the New Guinea Land Titles Restoration

37 Cf. Laws Repeal and Adopting Ordinance 1921, s. 9, as to rights recognized by native custom.

38 Expropriation Ordinance 1920, ss. 3, 4.

39 Lands Registration Ordinance 1924, ss. 16 *et seq.*, which required the Registrar to bring under the Ordinance land and rights affecting land registered in the Grundbuch without application. Division 2 of Part 3 then made detailed provisions for the protection of native interests when land was being brought under the Ordinance (ss. 21-39).

40 For land over which a property title could be acquired by a non-indigenous person—i.e. only in case of "ownerless" land or land sold by indigenous persons—the German law recognized from 1885 to 1899 the New Guinea Company as solely entitled to this right. After 1899 it was the Imperial Administration (the Fiscus). A thorough inquiry and investigation, followed by a final call-up, of any opposing indigenous rights was prescribed. For details, see the Instructions issued by the Company on the basis of the Imperial Ordinance of 20 July 1887 (*Deutsche Kolonial-Gesetzgebung*, vol. I, p. 472).

Ordinance 1951.[41] Difficulties of proof did not appear too burdensome to be overcome, and after a further investigation into any opposing titles a constantly growing number of titles were restored. It was only early in 1962 that indigenous communities, after unsuccessfully maintaining their claims before the Commissioner of Titles, appealed to the Supreme Court of the Territory. The case which became the test case was that of *Tedep v. Custodian of Expropriated Property.*[42] The land involved in the case was an area of some 466 hectares at the foot of Mt. Varzin,[43] near a settlement called Paparatava, in a region near Rabaul settled by the Tolai people. A German trader named Rudolf Wolff became interested in the land around the turn of the century. He negotiated a deal with Tokitan, the man who was indicated to him as the "lualua" (elder) of the "vunatarai" or tribal community, Wolff acting as agent of the German Administration. He finally reached agreement and handed over to Tokitan and the vunatarai the various goods agreed on as purchase price for the land area covering some 320 hectares and described as Toboli (in German records called Tobaule). He then began his plantation, built a house and brought his wife out. Next year a son was born to him. In March 1902 he was warned of unrest among the tribesmen who were said to be incensed at his plantation including a native "marawot", which by their custom was their holy meeting place. He was also advised that one Tokilan, who earlier had been lualua, had declared the deal ineffective as he had not been consulted. Wolff disregarded the warnings. One day in April 1902, shortly after he had left home for the day, a group of native tribesmen arrived under Tokitan, attacked his house and killed his wife and son. A Miss Coe, who was staying with the Wolffs, was able to escape and finally alarm neighbours. Government action was taken instantaneously. With Governor Hahl on sick leave in Germany, a young colonial administrator named Wolff was in charge at Rabaul. He became convinced that the killing of Mrs. Wolff and her baby was an attempted uprising of the natives. He therefore called on the military police force of the colony to take the necessary retaliatory measures. The force began a drive against the Paparatava tribe and killed many of them in the next few days, including Tokitan. Furthermore, all their land which abutted on Wolff's Toboli was confiscated. Full reports of all these events were included, in summary form, in the Report of the German Colonial Office as annexed to the Imperial German budget for the year 1904.[44]

41 For a learned review of it, see Ewart Smith, in *South Pacific,* vol. 5, p. 48.

42 See 38 A.L.J.R. (1965) p. 344, for the appeal to the High Court.

43 See German Colonial Office records, section dealing with "General Conditions in Kaiser-Wilhelm Land", vol. 2989, pp. 70 *et seq.,* which the author was able to inspect in the German Central Archival Office at Potsdam (East Germany), with the permission of the East German authorities. The area was called Varzin by the Germans after Bismarck's famous landed estate which the nation had given him.

44 Page 220 V., Appendix on Development of Colonies, 1/4/02-31/3/03; see *Reichstag Acta* for Colonies, vol. 1117 of Files of German Colonial Office at the Central Archival Office.

Hahl, the German Governor, unpopular with many of the planters because of his sympathies with the indigenous people, returned to New Guinea in 1903. Restoration of more normal conditions for the people of Paparatava was one of his early tasks. Following investigations, he had one half of their confiscated lands returned to them. The other half, over 200 hectares, was taken over by the German Administration. Rudolph Wolff who in 1901 had been able to buy from the Administration a property title over Toboli was now able to buy from the Administration in 1903 the neighbouring tract which had been taken over by the German Government. On 29 February, 1904, Rudolph Wolff was entered in the Grundbuch as proprietor of the two tracts of land, which together were called Varzin in German times. This then was the state of Wolff's property which, as enemy property, became subject to expropriation in 1921.

Under the terms of the Expropriation Ordinance, and the Laws Repeal and Adopting Ordinance[45] the title to it became vested in the Custodian of Expropriated Property. Section 8 of the latter Ordinance clearly stated that previously acquired land rights were to be preserved. The rule of preservation of rights applied also to native rights (section 9). In order to convert rights existing under the German Grundbuch system into rights under the newly introduced Torrens system of registration of title, the Lands Registration Ordinance 1924 required in all cases a detailed inquiry into possibly existing native rights. The fact that no native rights were registered, or that the registration of such rights had been cancelled was not of itself to be taken as evidence that the rights did not exist (section 26 (4)). The Commissioner of Native Affairs was one of the persons who had to be notified of the intended registration, and he was bound by the Ordinance to do two things: first, he had to post a notice at the office of the district officer nearest to the land in question, calling on all natives or native communities to lodge claims over the land within a period of three months; secondly, he was bound to make locally any inquiry he might think necessary.[46] Only after both these duties had been performed without emergence of any native claim could the necessary certificate be given by the Commissioner which then enabled the Registrar to proceed with the registration of title. Finally, in cases where native people lived on the land the Commissioner was bound to refer the question of their title to the Central Court.[47] In the case of the Varzin property, which was in dispute in the *Tedep Case, supra,* no native right of any kind was reported, and the Registrar issued a certificate of title to the Custodian of Expropriated Property in 1928. In the meantime the latter had in 1926 sold the property by auction on terms to one Tom Garrett, the predecessor in title of Mrs. Norah Richards, his widow, who is the person in possession of the

45 Expropriation Ordinance 1920, s. 4; Laws Repeal and Adopting Ordinance 1921, ss. 5, 7.

46 Section 22 of the Ordinance.

47 Section 24 of the Ordinance.

property at the present time. Garrett went into possession in 1926 and remained so until the Japanese invasion. His widow resumed possession after the war and made in 1948 final payment under the contract of sale.

Owing to destruction of both original and duplicate of the certificate of title it proved necessary after World War II to wait until the necessary legislation had been passed to provide for restoration of titles. Provisional legislation under the National Security (External Territories) Regulations[48] and the Lost Registers Ordinance[49] was followed by the Land Titles Restoration Ordinance of 1951. Under this Ordinance the Commissioner of Titles is bound, in case a claim for restoration of a title is made to him, to publish this fact extensively.[50] In case he then makes a provisional order for the issue of the title, this has to be published in the *Gazette* (section 34). In addition, the Commissioner must inform a number of specified persons, including the Commissioner of Native Affairs, of this order. The latter has duties clearly set out in the Ordinance; in a case like the *Tedep Case*, where no duplicate supported the restoration claim, they comprise posting of the notice in the nearest District Commissioner's office, and the making of any other inquiries the Commissioner of Native Affairs may think advisable. If no claim is made within a three months' period, a final order may be made. In the *Tedep Case*, a group of indigenous people of whom Tedep was one, alleged that they were entitled to the whole of the land: one half because Tokitan had sold without tribal authority, and the other half because the German Administration had acted *ultra vires* and illegally when confiscating land.

The claim was first heard by the Commissioner who rejected it. He found in fact that on the date appointed by the Administration for the coming into force of the Ordinance, i.e. 10 January 1952, "no native customary rights were retained... by a native or native community in respect of the land". As no appeal was lodged within the statutory period, Mrs. Richards was registered as transferee on 18 April 1961. In February 1962 an "appeal" was lodged, however, by Tedep and the other appellants. By considering them as persons who might consider themselves as entitled to notification of the Commissioner's final order by registered post who had in fact not received such notification, the Chief Justice of the Supreme Court of the Territory treated the appeal as timely. The basic issues then facing the Supreme Court were two:—

> (i) Had the appellants, or their predecessors in title, lost their customary rights not later than 1928 when they failed to lodge any notice in the proceedings under the Lands Registration Ordinance 1924?

48 Reg. 21A of the Regulations dealt with provisional dispositions regarding rights over properties where the certificates had been destroyed during the war.

49 The Lost Registers Ordinance 1950 dealt with the transfer to the Administration of the register set up provisionally under the National Security (External Territories) Regulations.

50 Section 34 of the Ordinance.

(ii) Even if they had lost them, did the destruction of the original and the duplicate of the certificate of title issued under the above Ordinance revive their lost rights?

The Court went at length into the customary tribal land rights among the community to which the appellants belong. With regard to that part of the property which Wolff had bought, for the Fiscus, from Tokitan as lualua for the native community, the Chief Justice found that a good title had passed. The presumption of regularity of the transaction would apply. However, he found differently with regard to that part of the property which the Fiscus had, prior to its sale to Wolff, confiscated from the native community.[51] The title of the Custodian was no better than that of Wolff. However, the community's failure to oppose the granting of a new statutory title under the Lands Registration Ordinance 1924, and the subsequent registration of the Custodian as the holder superseded all their rights.[52] What then was the result of the destruction of the certificate of title in World War II? It is here that the Supreme Court of the Territory came to the unexpected conclusion that restoration of title implies more than proving by secondary evidence what had been recorded on the certificate. As the Chief Justice said, it appeared to him that "the statutory title is itself destroyed ... (and restoration is) regarded as recreating a new statutory right to replace the former right and to owe its validity to the Restoration Ordinance".[53] Admittedly the Custodian was easily able to prove the contents of the destroyed certificate of title. However, in the Supreme Court's view, that court had now to decide the conflict between statutory right and native customary right on the basis that the former was a newly created right. Applying a general equitable principle, the court held that "according to law and justice", and in line with the principle that the first in time was to prevail, the native customary right prevailed over that part of the property which originally had been confiscated. The native right was to be registered on the title. In a unanimous judgment the High Court of Australia declined to follow the Supreme Court of the Territory in its assessment of the Restoration Ordinance. It refused to have anything to do with the latter court's view of the effect of the physical destruction of the certificate of title and of the restoration legislation. In a somewhat unnecessarily abrupt rejection of the Supreme Court's carefully considered conclusions, the High Court called them "demonstrably erroneous" and "plainly erroneous". The High Court showed on the basis of preliminary restoration legislation[54] that "the

51 Under German law, Wolff or any successor in title would gain full property rights if he remains in undisputed possession for a period of 30 years—the period of prescription (art. 900 Civil Code).

52 See transcript of judgment, pp. 32 *et seq.*

53 *Custodian of Expropriated Property v. Tedep* (1965), 38 A.L.J.R. 344, at p. 347.

54 The National Security (External Territories) Regulations and the Lost Registers Ordinance 1950; see *ante.*

Ordinance was enacted, not in the belief or upon the assumption that the destruction of the registers had destroyed all registered land titles in New Guinea, but merely for the purpose of restoring and replacing the destroyed registers".[55] There is in effect nothing in the 1951 Ordinance—particularly sections 35 and 36—which states that non-existence of native rights over the land can be proved merely by production of a clean certificate of title. As a result of its view of the restoration legislation the High Court found it unnecessary to deal with the difficult question: what right, under German pre-1914 law in the territory of New Guinea, the type of confiscation effected in the *Tedep Case* had on purchasers from the German Administration. This might have been of particular value for the present-day Administration of the Territory, as there appear to be other titles based originally on acts of confiscation by the German Administration.[56] The High Court appears, in the author's opinion, to overestimate the difficulty of obtaining from Germany all the statutory material which may be required.[57]

The judgment of the High Court of Australia came as a rude shock to those indigenous people who had counted on the view of the Territory's Supreme Court as final for them. The local newspapers reported rioting and burning from the Varzin property and its surrounding area.[58] However, feeling appears to have quietened down again.[59] For the great number of holders of titles to property in the Territory whose certificates had been similarly destroyed in the war, and who had since been threatened for the first time with native customary right claims, the High Court decision came as a relief. Registration which had been held up since the Supreme Court's decision could now proceed without further delay under the Restoration Ordinance. This means that credits could again be sought and obtained by an important section of the business community from the banks on the normal basis of overdraft against deposit of title deeds.

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55 *Tedep Case,* at p. 349.

56 See Rowley *loc. cit.,* p. 3, reporting a "confiscation" from an area near Friedrich-Wilhelms-Hafen for "conspiracy"; in this case the natives were handed back only "small native reserves".

57 See p. 239 of transcript of High Court proceedings, where the Chief Justice remarked on those difficulties. What is wholly gone in Germany are the records of the New Guinea Company which until 1943 were kept in Berlin; in a September air-raid that year they all went up in flames. Included among them were apparently all copies of Titles Office records of their New Guinea holdings in 1914.

58 *Pacific Islands Monthly,* December 1964 and January 1965, *Canberra Times,* 3 February 1965 and 4 February 1965.

59 A question never investgiated so far is of course whether under German law the native people would have had any right to be indemnified for an excessive exercise of the Governor's executive powers; if there ever was such right, the effect of the lapse of time on that right would next have to be investigated.