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remarks to the Attorney-General the Chief Justice stated that it was not his intention to have issued the order dated 2nd November, and no orders had been given to the registrar to issue it.

The application for leave to appeal was refused, and the order dated 2nd November cancelled as having been issued without authority; and as the resistance to the former order of the Court had been materially modified by the affidavit filed the order relative to costs was discharged from the date of filing the affidavit.].

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Jan. 22.

[CIVIL JURISDICTION.]

TURNER *v.* SHERRARD AND ANOTHER.

Liability of adjoining owners to fence lands—Fences (Dividing) Act, New South Wales (9 Geo. IV. No. 12)—Ordinance No. I. of 1875—Ordinance No. II. of 1875—Proclamation (adopting laws of New South Wales), 14th October, 1874—Supreme Court Ordinance 1875, ss. 26–28—Resolution of Council, 11th March, 1876.

On an action brought under the Fences (Dividing) Act of New South Wales (9 Geo. IV. No. 12), to compel an adjoining owner to pay half the cost of erecting a dividing fence,

Held, that even supposing the Fences (Dividing) Act of New South Wales to be in force in Fiji (which, in the opinion of the Court, it was not), its provisions could only apply to the case where the fencing was necessary for the convenience of both properties, which was not the case here.

This was a claim for 100*l.* 1*s.*, which amount the plaintiff, Mr. James B. Turner, of Rewa, sought to recover from the defendants, Messrs. Sherrard and Crowe, of Wainikavika, Rewa, for their half of the expense of erecting eighty-seven chains of a boundary fence between the respective properties of the plaintiff and defendants. There was no dispute as to the fence having been erected; but the entire question resolved itself into one of law—as to whether any obligation

devolved upon defendants to contribute one moiety of the expenses incurred in the erection. The plaintiff relied on the Fences (Dividing) Act of New South Wales as being part of the laws of this Colony. The defendants denied their liability, pleading that no obligation to pay for or to erect one-half of the fence rested by law upon them. There were other averments, but the above represents the facts substantially put in issue.

Mr. Thomas for plaintiff.

Mr. Garrick for defendants.

The arguments sufficiently appear from the judgment.

FIELDING CLARKE, Acting C.J. This is an action brought by a planter on the Rewa, to recover 100*l.* 1*s.*, being one-half of the cost of making a fence along the dividing line of the plaintiff's property and the defendants'. The action is brought under the Fences (Dividing) Act of New South Wales (9 Geo. IV. No. 12), which enables a person, by giving certain notices, to call upon his neighbour to share in the expense of making a fence between their properties. The plaintiff has given the proper notices and has made the fence; but the defendants object to pay a share of the cost for ne reason, amongst others, that the Fences (Dividing) Act is not in force in the Colony, and this latter question has been carefully discussed during the course of the case. Of course if I thought that the plaintiff's case was not within the Act it is unnecessary to decide whether the Act is in force or not; but as it has been stated that this question is one of general interest, and that probably other disputes would rest upon its solution, there is no reason why the Court should not express any opinion it might have formed.

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Reference has been made to other statutes of New South Wales which from time to time have been acted upon in the Colony, and the first remark I have to make is, that, as far as I have been informed, it appears that the present is the first occasion upon which the Fences (Dividing) Act has been sought to be applied. In the early stages of a colony it might sometimes be a question of fact for a court to determine whether a particular law had been adopted therein. At any rate, the fact that for many years there has been no practical application of a foreign statute of general importance is at least worthy of some consideration as tending to raise a presumption that such a statute is not in force. So far, therefore, as the Court can be guided by general user the facts appear to be against the plaintiff. However, if it appear positively that the statute in question has been adopted by the Legislature and that such adoption has not been renounced, the fact that it has been allowed to remain a dead letter would, of course, not prevent its present application.

Ordinance No. I. of 1875 has been referred to, but has evidently nothing to do with the present question; the object of that Ordinance being merely to ratify and confirm past things done under the laws previously administered.

By Ordinance No. II. of 1875, styled "The Past Laws Temporary Continuance Ordinance," a previous proclamation, dated the 14th day of October, 1874, for the adoption of all Laws, Acts, or Statutes then in force in the Colony of New South Wales, as notified in *Government Gazette*, No. 3, of that date, was, by the combined effect of s. 2 and the second clause of the schedule, declared to be of the same force and effect as though it were repeated and re-enacted.

Turning to the *Government Gazette* referred to, I find that the effect of the proclamation was to adopt all the laws, acts or statutes then in force in the Colony of New South Wales, "so far as the same shall be applicable to the circumstances of this Colony." It is much to be doubted whether to any extent whatever the Act can be held to be so applicable; but in the view I take of the present case it is unnecessary to consider this.

By a provision (ss. 26–28) contained in the Supreme Court Ordinance 1875, passed less than two months after the Past Laws Temporary Continuance Ordinance, it was enacted that the Common Law, the Rules of Equity, and the Statutes of general application which were in force in England at the date when this Colony obtained a local Legislature—that is to say on the 2nd day of January, 1875—should be in force within the Colony, subject to a similar limitation as that provided for in the adoption of the New South Wales laws as to their adaptability to the circumstances of the Colony. This of course suggests the question whether it can possibly have been intended that two separate and distinct bodies of general law (those of England and New South Wales) should be co-existent in Fiji. I think that this is impossible; that, therefore, the provision of the Supreme Court Ordinance operates as a repeal by necessary implication of the legislative adoption of New South Wales laws; and that the last mentioned laws thereupon ceased to have effect except, perhaps, such of them as may since have been universally acted upon and accepted.

A Resolution of Council, published in the *Gazette* of March 11th, 1876, has been relied upon by the plaintiff; but it is clear that the effect of such a resolution

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can extend only so far as the existing law then warranted. I, therefore, hold a strong opinion that the Fences (Dividing) Act is not in present operation in this Colony. It is not, however, necessary to decide this definitely, because I hold further that even if that Act were in force it could not be applied to the present case. During the proceedings I have carefully perused the Act from beginning to end, and am of opinion, although there is no express provision contained in it to that effect, that the very stringent procedure which it allows is only meant to be applied to cases where the dividing fence was mutually necessary to both owners. This of course would be generally the case in a grazing country, but would often not be the case where a great part of the agriculture consisted of crops. In a district like the Rewa, where a great part of the land is planted with sugar, it would be perfectly monstrous to suppose that an owner of land, who for business purposes chose to keep cattle, could by giving notice call upon his neighbours to share the expense of making a fence round his property in order to prevent his cattle trespassing upon their sugar crops.

In the present case the plaintiff had been keeping cattle, and had in fact been successfully sued in the magistrate's court for their depredations on his neighbour's land. The fence in question was, therefore, clearly necessary on his part. On the other hand, the defendants had never kept cattle; and, although at one time they had had a few goats on their land, they said,—and there is no reason to doubt the statement,—that these goats had been given up before they received the plaintiff's notice to fence upon which this action was based. On the defendants' part, therefore, there was no necessity for this fence. I, therefore, think

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that there is in this case no such mutual necessity as is contemplated by the statute; and that, therefore, even if the statute could be applied in Fiji, the present case is not within it. A question has been raised as to the sufficiency of the fence, and, if it is any satisfaction to the parties to know, it might be stated that the Court thinks that the fence is a good and sufficient one; but as I hold that the plaintiff has not made out a cause of action the judgment must be for the defendants, and with costs.

Judgment for defendants with costs.

[PROBATE JURISDICTION.]

June 15.

In re DAVID WHIPPY, SENIOR, DECEASED.

In re DAVID WHIPPY, JUNIOR, DECEASED.

Reference to Supreme Court by Commissioner of Stamps—Stamp Ordinance 1876—*Stamp Ordinance* 1880, *ss.* 29, 70, 71, 72—*Stamp Ordinance* 1883—*Stamp Duties Act of New South Wales*, 1871—55 *Geo. III.**

On a reference by the Commissioner of Stamps for the opinion of the Supreme Court, under s. 29 of the Stamp Ordinance 1880, as to whether duty was payable upon the estate of a person whose death had occurred before, but as to whose estate no grant of probate or administration had been applied for until after, the passing of that Ordinance,

Held, firstly, that, inasmuch as at the time the grants were made the Stamp Ordinance 1880 was in force, the amount of duty could not be assessed under the Stamp Ordinance 1883 (which repealed the earlier Ordinance) but must be assessed with reference to the law then existing.

* Cap. 101?