1887
August 13.

[APPELLATE JURISDICTION.]

AGENT-GENERAL OF IMMIGRATION *v.* J. C. SMITH AND COMPANY.

Case stated—Appeals Ordinance 1876, *s.* 11—*Polynesian Immigration Ordinance* 1877, *ss.* 42, 97, 98—"*Indentured.*"

On an appeal by way of a case stated from the decision of the Chief Police Magistrate dismissing an information brought by the Agent-General of Immigration, on behalf of certain Polynesian labourers, against the owners of a store to recover wages owing to them by the lessees of such store who had failed to pay such wages,

Held, firstly, that an appeal lies, under s. 11 of the Appeals Ordinance 1876, by way of a case stated from the decision of a magistrate dismissing an information.

Secondly, that under the Polynesian Immigration Ordinance 1877 the wages of labourers indentured under that Ordinance and employed by the lessees of a plantation do not operate as a charge upon such plantation unless the owners thereof have authorised, expressly or impliedly, such employment.*

Held, further, that the words "shall have been indentured" in s. 98 mean legally indentured, or, in other words, duly indentured.

This was an appeal by way of a case stated from the decision of the Chief Police Magistrate dismissing an information brought by the Agent-General of Immigration on behalf of certain Polynesian labourers, whereby it was sought to recover from Messrs. J. C. Smith & Co., the owners of a store in Suva, certain wages owing by the lessees of such store in respect of the employment of such labourers therein, and which wages the lessees had failed to pay.

The Acting Attorney-General (Mr. Winter) for the appellant.

Mr. Scott for the respondents.

* See now the Polynesian Immigration Ordinance 1888, s. 139.

1887

AGENT-GENERAL OF IMMIGRATION v. J. C. SMITH AND COMPANY.

The facts and arguments sufficiently appear from the judgment.

H. S. BERKELEY, Acting C.J. This was an appeal to the Supreme Court on a case stated by the Chief Police Magistrate, at the request of the plaintiff, against the dismissal of an action brought by the plaintiff against the defendant to recover against him a judgment for, as set out in the information, the sum of 26*l.* 8*s.*, being 22*l.* for wages due and owing on account of Polynesian immigrants indentured to serve on the plantation known as Messrs. Hood & Talbot's auction and general store, Pier-street, Suva, and 4*l.* 8*s.* in respect of interest at 10*l.* *per centum per annum* as per account attached, he, the said George Smith, trading as J. C. Smith & Co., being then and still in possession of the said plantation.

Preliminary objections to the hearing of this appeal were taken by Mr. Scott, who appeared for the defendant, on the grounds:—(1) That the Appeals Ordinance does not give the plaintiff whose case has been dismissed a right of appeal by way of a case stated. (2) That notice of appeal was not given to the respondents within the time limited. There was, however, no force in these objections and I overruled them. The 11th section of Ordinance XVI. of 1876 allows *either* party feeling himself aggrieved to require the magistrate to state a case for the decision of the Supreme Court and is intended to meet cases such as this. Notice of appeal had been given to the magistrate within forty-eight hours and a copy of the case stated by the magistrate was given to the respondents by the appellant within seven days and that is all that the Appeals Ordinance requires to be done. The appeal was therefore heard.

It appears from the evidence given before the Chief

1887

AGENT-GENERAL OF IMMIGRATION v. J. C. SMITH AND COMPANY.

Police Magistrate that the persons referred to in the information as Messrs. Hood & Talbot were in the year 1884 carrying on business as auctioneers in the town of Suva; that for the purposes of such business they occupied certain premises in Pier-street, Suva, which premises they held under a lease from the defendants; that on the 1st day of August, 1884, Hood & Talbot, while the lease was subsisting, engaged under indenture four Polynesian immigrants as servants for the period of one year at 6*l.* per annum. The indenture of service is signed by Hood & Talbot and by John Forster for the Agent-General of Immigration on behalf of the immigrants, and by it the four immigrants whose names and registered numbers are entered therein are expressed to be duly indentured to serve Messrs. Hood & Talbot, of auction and general store, Pier-street, Suva, for the term of service set against their names respectively. So long as Hood & Talbot retained possession of the leased premises the immigrants were employed thereon, but some time in the year 1885 the defendant re-entered into possession, Hood & Talbot having become insolvent and departed the Colony. Hood & Talbot did not pay the wages agreed to be paid and on the 2nd September, 1885, judgment was obtained against them in this Court for the amount then due by them. Some portion of the moneys due was recovered under this judgment but there is still remaining due the sum of 22*l.* This sum together with interest is now sought to be recovered by an action in the Chief Police Magistrate's Court against the defendant, the registered owner of the premises in which Hood & Talbot carried on their business as auctioneers, and of which they were, as I have stated, at the time of the signing of the indenture, the lessees.

The plaintiff very properly did not contend before me that the defendant could be made personally liable for payment of the amount due for the wages by Hood & Talbot, but the plaintiff contends that J. C. Smith & Co. may be made defendants in an action to recover a judgment for the wages, and that such judgment may thereupon be enforced by a sale of lands leased by Hood & Talbot from the defendant. This the plaintiff contends can be done, and in support of such contention urges that wages due to Polynesian immigrants are under Ordinance XI. of 1877, s. 42, "a preferable charge on the lands in respect of which the services of such immigrant shall be indentured"; that by s. 98 of the same Ordinance it is not necessary to show that the person to whom the immigrants were indentured had authority to indenture such immigrants to perform service upon the lands, but that it is sufficient, in order to charge the lands, to prove that the immigrants in respect of whom the wages are due were "allotted or indentured as the case may be to perform service on such plantation," and that such has been proved in this case; and that as the defendant is in possession of the lands in respect of which the immigrants were allotted to perform service he may under the provisions of the 97th section of the Ordinance XI. of 1877 be made defendant in any information for the recovery of money due as wages to such immigrants.

The Chief Police Magistrate regarded this action as a personal claim against the defendant for payment of a debt admitted to have been originally contracted by third persons, and not in the light of a proceeding under the 97th section to establish against the lands of the defendant a statutory charge created by operation of the 42nd section of that Ordinance; and, taking that view,

1887

AGENT-GENERAL OF IMMIGRATION v. J. C. SMITH AND COMPANY.

the Chief Police Magistrate dismissed this action with costs without determining the question whether the lands of the defendant were or were not liable under the Ordinance for the debt incurred by his lessees Hood & Talbot. This the Chief Police Magistrate did because he conceived that the only question for him to decide was whether the defendant was, on the evidence before him, personally liable for the moneys due by Hood & Talbot. From this dismissal the plaintiff appeals by way of reference to this Court on a case stat .

It clear that the Chief Police Magistrate was right in coming to the conclusion that the defendant was not personally liable. He was not a party to the indenture of the 1st August, 1884, nor was he in any way a party to the contract of service thereunder. He is not alleged to have guaranteed the payment of the wages by Hood & Talbot and he is certainly not personally liable under any of the provisions of the Ordinance XI. of 1877. In only one of the above modes could the defendant have become personally liable to answer for the default of Hood & Talbot in paying the wages they had contracted to pay.

The Chief Police Magistrate was also of opinion that if it was sought to make the lands of the defendant liable for the wages of the immigrants the proper course was to proceed in the Supreme Court to enforce the statutory charge, and that this might be done either by way of an application for a sale of such lands under the judgment already obtained by the plaintiff against Hood & Talbot, or by way of a substantive action for a declaration of lien and an order for sale in realisation thereof.

The Chief Police Magistrate was right in believing

that the intervention and assistance of the Supreme Court is necessary for the enforcement of a statutory charge on lands where such statutory charge exists; but he was wrong in the conclusion which he drew that such an action as this must either be a personal action and therefore not sustainable on the evidence or an action in the nature of a proceeding which should have been taken in the Supreme Court and on that ground also not sustainable in the Magistrate's Court. The plaintiff, it is true, contended before the magistrate that the defendant was personally liable, but he also contended that the action might be brought for the purpose of obtaining a judgment which would bind the land of the defendant if not his personal effects.

If the immigrants were, as the plaintiff alleges, duly indentured to serve Hood & Talbot on the lands of the defendant, known as the auction and general store, Pier-street, then their wages are a preferable charge under s. 42 on such lands; and if the defendant is, as is contended, the person in possession of the plantation upon which the immigrants were bound to serve within the meaning of the 97th section then the action to obtain a judgment by means of which those wages might be recovered by proceedings against the land might be brought in the Magistrate's Court against the defendant. The defendant would not under such a judgment be liable personally, and such judgment could only be given effect to by means of a proceeding for that purpose taken in the Supreme Court. But judgment might have been given by the magistrate against the defendant had it been proved to him that the immigrants had been duly indentured to serve on the plantation, and that the defendant was the person in possession within the meaning of the statute. The magistrate should therefore have

1887

AGENT-GENERAL OF IMMIGRATION v. J. C. SMITH AND COMPANY.

decided these two questions before dismissing this action. The action before the magistrate would in any case be a circuitous mode of proceeding, for the charge on the land is created by the statute itself and not by the judgment of the magistrate, and the statutory charge might be enforced against the land in the Supreme Court without any proceedings being taken before the magistrate. Still there are clearly two modes of procedure—the one by way of direct application to the Supreme Court, the other by way of application to the Magistrate's Court first and the Supreme Court afterwards—either of these courses was open to the plaintiff and he has elected, as he had a right to do, to adopt the latter. The Chief Police Magistrate was therefore wrong in coming to the conclusion that the only question he had to decide was whether the defendant could be made personally liable for the debt of Hood & Talbot. That was not the sole question involved in the action before the magistrate. There can be no doubt but that the defendant is not so liable.

But there is the further question whether under the 97th section the defendant can be made to defend an action for the recovery of a debt arising out of a contract made by Hood & Talbot by reason of the fact that he is now in possession of certain lands to serve on which it is alleged the immigrants were duly indentured by the lessees, Hood & Talbot. This is the important question which should have been determined. The whole question turns upon the nature of the engagement entered into by Hood & Talbot and their authority to enter into such engagement in so far as it may be sought to affect the defendant thereby. It is necessary, therefore, to consider whether the immigrants engaged to the lessees Hood & Talbot were, as

alleged, duly indentured to serve them on the lands of the defendant, known as the auction and general store, Pier-street; and, if they were so indentured, then whether the defendant is, within the meaning of the 97th section of the Ordinance XI. of 1877, in possession of the lands so as to make him liable to be made defendant in this action.

The determination of the first question must turn upon the authority of Hood & Talbot to create a charge upon lands which did not belong to them but to a third person, the defendant in this case. That authority may be either express or implied. If express, the authority must have been given at the time, or subsequently by a recognition of the act and an adoption of the contract. It is clear that in this case there was no express authority in either sense of the word given by the defendant to Hood & Talbot to enter into the contract of service with the immigrants. The defendant does not appear to have known anything of the matter at the time of the engagement, and subsequently when he re-entered and took possession of the lands he did not recognise and adopt the contract of Hood & Talbot by continuing the employment of the immigrants, but on the 2nd of September, 1885, the indentures of the men to Hood & Talbot were cancelled by the proper authorities and the contract of service between them and Hood & Talbot terminated without the defendant having been in any way concerned therein. It is also clear that there was no implied authority given by the defendants to Hood & Talbot to enter into the contract. It is true that the relationship of lessor and lessee existed between the defendant and Hood & Talbot; but there is nothing in that relationship from which an authority to create a charge upon

1887

AGENT-GENERAL OF IMMIGRATION v. J. C. SMITH AND COMPANY.

the freehold can be implied. Such an authority must be clearly shown.

But the plaintiff contends that by the 98th section the wages are a charge when once the immigrants have been indentured to perform service on the lands notwithstanding that the services of such immigrants were engaged by one who had no authority whatever to enter into a contract for service to be performed on such lands. I do not so read that section. It is true that the section commences with a declaration to the effect that wages are a first charge on the plantation in respect of which the immigrants shall have been indentured, but the words "shall have been indentured" mean shall have been legally indentured, "indentured by due authority," or, in other words, "duly indentured." That such is the meaning to be attached to the words "shall have been indentured" is obvious from their appearance further on in the 98th section itself. These words can only mean lawfully indentured, that is to say indentured by a person having authority to enter into a contract with the immigrants to perform service on the land. This authority may exist in the person entitled to the land as owner, or it may exist in some person who, though not entitled to the land as owner, is yet authorised by the owner either expressly or by necessary implication to enter into a contract with the immigrants to perform service on the land. The 98th section is intended to meet cases of the latter description, and not to invest a stranger acting altogether without the knowledge or consent of the owner with the extraordinary powers contended for by the plaintiff. That section after declaring that wages are a first charge on lands to which immigrants have been indentured provides that in any proceedings taken for the recovery of wages

due to immigrants it shall not be necessary to show that the person to whom the immigrants were duly allotted or indentured was the employer, or other person, entitled to have such immigrants allotted or indentured to him in respect of the plantation or lands on which such moneys are sought to be recovered, but it shall be sufficient to show that such immigrant was duly allotted or indentured as the case may be to perform service on such plantation. That is to say, where wages are due to an immigrant it shall not be necessary to show that the employer—that is the person to whom the immigrants were indentured, or other person through whose agency the immigrants were indentured to the employer—was the owner of the land on which the immigrants were indentured to serve; but it is sufficient to show that the immigrants were duly indentured, that is to say, it shall be sufficient to show that the employer, or other person, though not owner, had the owner's authority to indenture the immigrants to perform service on the land. That being shown, a judgment declaring the wages to be a first charge upon such land may be obtained. It is a *sine quâ non* that the immigrant must be "duly indentured" to serve on the land and he can only be so indentured by the owner of the land or by some other person by his consent.

Now it is admitted that the defendant is the owner of the lands which it is sought to charge with the payment of the wages due by Hood & Talbot, and it is clear that the persons to whom those wages are due were indentured to Hood & Talbot without the defendant's authority either express or implied. I hold, therefore, that the immigrants indentured to Hood & Talbot must in law be taken to have been indentured to them personally and not to them in respect to the lands of the defendant. Moreover

1887

AGENT-GENERAL OF IMMIGRATION v. J. C. SMITH AND COMPANY.

it seems to me from the wording of the certificates of indenture, that the plaintiff must at the time of the execution of the contract of service have regarded this as a personal contract between himself on behalf of the immigrants and Messrs. Hood & Talbot, for in the certificate of indenture the immigrants are expressed to be bound to serve "Messrs. Hood & Talbot of Auction and Pier-street." Had it been thought at the time that Hood & Talbot could indenture persons to their lessor's property without that lessor's knowledge or consent the certificate of indenture would have been couched in the usual terms and the immigrants would have been indentured to serve Messrs. Hood & Talbot on the plantation or lands known as auction and general store, Pier-street. In the certificate of indenture, as it stands, the words "of auction and general store, Pier-street" are merely descriptive of the residence or place of business of the employers of the immigrants and are not to be regarded as charging words creating a lien on the land for the wages of the employed.

In the view which the Court takes of the nature of the contract of service entered into on the 1st day of August, 1884, between Messrs. Hood & Talbot and Mr. Forster on behalf of the Agent-General of Immigration it is not necessary for the Court to express its opinion whether or no the defendant is in possession of the auction and general store, Pier-street, within the meaning of the 97th section.

I am of opinion that the Chief Police Magistrate was right in dismissing this action, and his judgment will, therefore, be confirmed, though upon grounds other than those which influenced him in arriving at his decision.

This appeal is, therefore, dismissed, but as the legal questions raised in this action involved the interpretation

of somewhat obscure sections of the Ordinance and are such as might properly have been raised by the plaintiff, there will be no order as to costs.

1887

AGENT-GENERAL OF IMMIGRATION v. J. C. SMITH AND COMPANY.

Appeal dismissed without costs.

HIGH COMMISSIONER'S COURT FOR THE WESTERN PACIFIC.

1889
Aug. 16, 19.

[CRIMINAL JURISDICTION.]

THE QUEEN *v.* WEAVER.

Royal Prerogative—Jurisdiction—Foreign Jurisdiction Act, 1843—*Pacific Islanders Protection Acts*, 1872, 1875—*Western Pacific Order in Council*, 1877.

Her Majesty the Queen has jurisdiction and power by virtue of Her Royal prerogative and of inherent right, independently of the Foreign Jurisdiction Acts and the Pacific Islanders Protection Acts, 1872 and 1875, to make laws for the government of Her subjects within the Western Pacific Islands by Orders in Council.

Further, that the Pacific Islanders Protection Acts and the Orders in Council issued in respect of them are not restricted in their operation to offences committed by British subjects against Pacific Islanders, but apply also to offences committed by British subjects *inter se*.

This was a motion in arrest of judgment for want of jurisdiction in the case of Henry Ernest Weaver, a British subject, late supercargo on board the schooner *Colonist*, of Sydney, who had on 15th August, in the High Commissioner's Court for the Western Pacific, sitting at Suva, Fiji, consisting of the Chief Judicial Commissioner and four assessors, been convicted of the wilful murder of William Greenlees, master of the