

[CIVIL JURISDICTION.]

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Sept. 23.AGENT-GENERAL OF IMMIGRATION *v.* SHUTE'S
EXECUTORS.

*Polynesian Immigration Ordinances 1877, s. 42, and 1888, s. 188—
Immigrants' lien for wages and return-passages—Priority over
mortgages.*

The effect of s. 42 of the Polynesian Immigration Ordinance 1877, is to give the immigrants' lien for wages and return-passages created by that section priority over all mortgages and encumbrances whenever incurred upon the plantation to which such immigrants are indentured.

*Agent-General of Immigration v. Skarpe, Fletcher & Co. and the Union Bank of Australia** approved.

The facts of the case were as follows:—

In the years 1881 and 1882 Thomas Robinson Shute had indentured certain Polynesian labourers upon his plantation at Naidi, Savusavu, in the island of Vanua-levu. Shute died in March, 1882, and a mortgage for 250*l.*, borrowed by his executors from William Richard Scott (since deceased), was registered in November, 1883. In August, 1885, judgment in the Chief Police Magistrate's Court was recovered against Shute's executors by the Agent-General of Immigration for the sum of 46*l.* 8*s.* 2*d.* due in respect of wages and return-passages of certain of the Polynesian labourers indentured on Naidi in 1881 and 1882. At the date of the present proceedings this judgment was still in force and unsatisfied. Neither the principal nor any interest on this mortgage was paid; and on 6th April, 1891, an order of the Supreme Court was obtained at the instance of the mortgagee's executors for the sale of Naidi plantation to satisfy the mortgage. On the 1st June following the land, being put up for sale subject to the

* *Ante* p. 115.

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Agent-General's judgment, did not realise the upset-price. A subsequent attempt was made on the 6th August, 1892, at the instance of the same parties, to sell the property at a reduced upset-price, with the same result. Subsequently in the same month a concurrent order for sale was obtained on the application of the Agent-General, and notice was given that the property would be put up for sale to satisfy the above judgment. In April, 1892, Messrs. Brown & Joske, of Suva, became the purchasers of the mortgage debt from Scott's executors, but no transfer of the transaction was either executed or registered.

Mr. Garrick appeared on behalf of Messrs. Brown and Joske, having obtained a rule *nisi* calling upon the Agent-General to show cause why the order for sale obtained by him should not be set aside, or at least varied by making it subject to the mortgagee's claim.

The Attorney-General (Mr. Udal) appeared to show cause against the rule, and took preliminary objections to the form of the rule and of the affidavit filed in the proceedings, contending they should have been intitled in the cause already in court, and that the affidavit was further technically inadmissible as evidence, and also that the rule disclosed no sufficient grounds for calling upon the Agent-General to show cause against it.

On his Honour intimating that before deciding upon these points he would hear the case on the merits,

The Attorney-General submitted that the present applicants, Messrs. Brown & Joske, had no *locus standi* whatever, as they were not the registered transferees of the mortgage which at present stood in the Registry in the name of Scott's executors; and under s. 39 of the Real Property Ordinance 1876 and s. 2 of Ordinance

No. I. of 1883 no others had any interest in the matter. The caveat which had been put on by the Agent-General was not a sufficient reason why the transfer should not have been executed, or even registered, when notice could have been given to him to remove it, or the transfer could have been effected under s. 93 of the Real Property Ordinance subject to the claim of the caveator, as there could be no question but that the mortgagee's claim was subject to that of the Agent-General. This last was the real question in the case, and he submitted that under the saving clause contained in s. 1 of the Immigration Ordinance, No. XXI. of 1888, the law affecting the rights and liabilities of the parties was governed by the old Immigration Ordinance, No. XI. of 1877. By s. 42 of that Ordinance the Agent-General's claim was a "preferable charge" on the lands in respect of which the immigrants' services were rendered "over and above all encumbrances charges and mortgages," and that whether the mortgage was executed and registered before or after the indentures in question. That section intentionally gave the Agent-General's claim priority over any such encumbrance. He further argued that even under s. 138 of the Immigration Ordinance, No. XXI. of 1888, wherein the law had been altered on this point,—now giving priority to a legal mortgage or encumbrance if executed and registered before the indentures were entered into—the Agent-General's claim would still take precedence.

With regard, however, to procedure, that pointed out by s. 151 of the new Ordinance, No. XXI. of 1888, had been adopted, under which the owner of the plantation only need be summoned before the Court, and not the mortgagees, who could always intervene if they considered their claim had precedence of that of the

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Agent-General. There was therefore no hardship, as now asserted, inasmuch as the mortgagees were no necessary parties to the present proceedings even if properly before the Court, which he contended the present applicants were not.

Mr. Garrick, in support of the rule, contended that as the sums representing the Agent-General's claim had accrued due since the date of the registered mortgage obtained from Shute's executors in November, 1883, that mortgage had precedence over them, and cited *Bradford Banking Co. v. Briggs* (1), *Hopkinson v. Rolt* (2) as authorities for his contention that the Agent-General had no right to go on practically advancing money to the owner of a plantation after he must be taken to have known of the existence of a mortgage; or that if he did choose to do so the mortgage must take precedence of any sums so advanced. He submitted that the Agent-General's duty was, instead of allowing this indebtedness for wages to run on indefinitely, to have sued for them from time to time as they became due, or to have cancelled the indentures, which he had power to do for such a cause under s. 24 of Ordinance No. XI. of 1877, and still more readily under s. 65 of Ordinance No. XXI. of 1888. Not having done so, however, the Agent-General could not now be heard to say that such claims took precedence of a registered mortgage of which he must be deemed to have had notice, the transferees of which were the present applicants, Messrs. Brown & Joske, who were only prevented from completing and registering their transfer by reason of the Agent-General having lodged a caveat forbidding any dealings with the property the subject of the transfer. He maintained that for this

(1) L. R. 12 App. Cas. 22.

(2) L. R. 9 H. L. C. 534.

reason they were now as much entitled to be heard on the present application as if the transfer now stood and was registered in their names.

[His Honour referred to the case of *Agent-General of Immigration v. Sharpe, Fletcher & Co.* decided by his predecessor, Chief Justice Clarke, in 1885.*]

Mr. Garrick submitted that that case was given before the decision in *Bradford Banking Co. v. Briggs (supra)* and he also cited *Union Bank of Scotland v. National Bank of Scotland.* (1)

H. S. BERKELEY, C.J. The rule must be discharged on the merits as well as on the technical objections taken by the Attorney-General. Holding the view I do as to the merits it is not necessary for me to decide these latter points, but enough has been said to indicate what is the proper way of intituling these proceedings in the cause before the Court. I concur in the view of Chief Justice Clarke expressed in the case of *Agent-General of Immigration v. Sharpe, Fletcher & Co. (supra)* decided in 1885, as to the effect of s. 42 of Ordinance XI. of 1877, in that it gave a preferential charge over all encumbrances and mortgages so far as the particular estate whereon the immigrants were indentured was concerned. It was that view which led the Legislature to alter the law in the new Polynesian Immigration Ordinance, No. XXI. of 1888, by giving priority (s. 138) over claims for wages and return-passages to legal mortgages executed and registered prior to the date of the signing of the indentures under which the claims arose, but it did not give priority to such mortgages subsequent to such date. As the facts here were shown, the indentures under which

* *Ante* p. 115.

(1) L. R. 12 App. Cas. 53.

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these claims were made were signed in 1881 and 1882, and the mortgage in question was executed and registered in 1883. I hold that the claims under these indentures must take precedence of the mortgage of 1883, and do so by virtue of s. 42 of Ordinance No. XI. of 1877. The cases quoted by Mr. Garrick were in point as between ordinary litigants, *e.g.* as mortgagor and mortgagee and persons who may ordinarily be advancing money, but I do not think they have any application to a case like this where the obligation of the debtor was incurred at the time of entering into the indenture. The effect of s. 42 is to give an immigrant indentured there a preferable lien on the land for whatever from time to time he might be entitled to sue on account of wages or any other account mentioned in the section, and that lien was one which might or might not have to be enforced according as the employer might or might not carry out his contract. It was a lien created by statute and enforceable, so far as wages went, at the time they became due; and, so far as return-passages went, was enforceable in case the money for the return-passages was not paid at the proper time stated in the Ordinance. It is not arguable that because the employer executed a mortgage, that of itself postponed the lien the immigrants had to that mortgage; but if the cases quoted by Mr. Garrick had their full weight attached to them that would be the effect. The statute was expressly intended to give priority to all such claims, and with that policy he had nothing to do. That question had been considered in framing s. 138 of Ordinance No. XXI. of 1888. This was no case of hardship, for the facts showed that the mortgage was executed subsequent to the liability for these claims being incurred. The mortgagee had only himself to

blame if any loss accrued to him; he should have inquired at the Immigration Office as to the position of the mortgagor in this respect as he must be deemed to have known the law. The rule must therefore be discharged with costs.

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Rule discharged with costs.