

## [CIVIL JURISDICTION.]

AGENT-GENERAL OF IMMIGRATION *v.* MOORE AND  
BANK OF NEW ZEALAND.

*Polynesian Immigration Ordinance 1877, ss. 42, 43—Return-passages  
of immigrants—Preferential charge—Interest.*

On the sale of an estate to which certain Polynesian immigrants had been indentured but whose return-passages had not been paid for, the purchaser does not buy the estate free from all encumbrances but subject to all charges upon it that may then be existing in respect of the wages or return-passages of any labourers so indentured. Such estate, however, is not charged with interest, as interest is imposed by the Ordinance by way of penalty and for which the employer must be sued.

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

This was an action, at the instance of the Agent-General of Immigration, who claimed the sum of 36*l.* and interest, which had been paid by the Immigration Department in returning to their homes six Polynesians who had been indentured by the defendant Moore on his plantation at Wainiaku, in the island of Taviuni, which had been recently purchased by the Bank of New Zealand at an execution sale; and asked for a declaration that such sum was a subsisting and preferential charge upon the said estate, and for an order for sale of the property if the Bank should decline to pay the amount.

*The Attorney-General* (Mr. Udal) for the plaintiff.\*

*Mr. Garrick* for the Bank of New Zealand.

It appearing that the defendant Moore, who was out of the Colony, had not been served with the writ, his

\* *Ante* p. 115.

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Honour intimated that his name ought not to remain on the record.

*The Attorney-General*, while submitting that under the existing rules of procedure such a course was not necessary but that the case could proceed without any amendment against the other defendant, asked that Moore's name should be struck out, and after some further discussion his Honour ordered that his name should be removed from the pleadings.

He then cited ss. 42 and 43 of the Polynesian Immigration Ordinance 1877, upon which the action was founded, and contending that the plaintiff's claim was admitted on the pleadings by the Bank, asked for a declaration that the claim was a subsisting and preferential charge on the estate now owned by the Bank of New Zealand, and for an order of sale to satisfy such charge as the Bank had declined to pay it. He referred to *Agent-General v. Sharpe, Fletcher & Co.*,\* decided by Chief Justice Fielding Clarke in 1885, and argued that the absence of Moore made no difference to the plaintiff's right to recover against the other defendant, the Bank, who had appeared and was defending the action.

*Mr. Garrick* contended that the Bank of New Zealand was entitled to judgment as the name of Moore had not been removed, and that the obtaining of a judgment against the original debtor (Moore) was a condition precedent to an order for sale being granted.

Evidence was then called to show that the Bank had disputed the claims made against it by the Immigration Department and only paid the wages demanded in respect of the labourers whose return-passages were now

\* *Ante* p. 115.

the subject of dispute upon the understanding that the Agent-General had abandoned these latter sums ; and that the Agent-General having withdrawn a caveat which he had placed upon the land for the purpose of securing his claim, the Bank had purchased the property at the sale free from all encumbrances.

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This contention was denied by the plaintiff, and evidence was called in rebuttal.

H. S. BERKELEY, C.J. This case is one of some difficulty and importance. At the commencement of the proceedings it appeared that Moore had not been served with the writ and I intimated that his name would have to be struck out or that judgment must be given for him, and that if I gave judgment for him I could not well give judgment against the Bank. Thereupon the Attorney-General made an application to strike out Moore's name, to which I have acceded.

[His Honour then reviewed the facts of the case in connection with the indentures of the labourers, and to the dispute which had existed between the Bank and the Immigration Office, and in doing so stated his approval of the judgment of Chief Justice Fielding Clarke, in *Agent-General v. Sharpe, Fletcher & Co.\**]

No one could contend that the correspondence put in showed any withdrawal of the claims of the Immigration Office—indeed it was the very opposite. I have only to deal with the effect of the correspondence and say whether the Agent-General has abandoned all claim, and no jury could say that he had.

With regard to the legal question as to whether the claim can be recovered against the present holders of the land, and whether the present owners are liable here.

\* *Ibid* p. 115.

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[His Honour referred to ss. 42 (1) and 43 (2) of Ordinance XI. of 1877.] I am of opinion that the purchaser at the execution sale did not buy the estate free of all encumbrances, but subject to all charges that might then be existing upon it in respect of wages or return-passages of labourers indentured upon it. The land was therefore sold subject to this lien. Can the plaintiff then succeed in the present action in the absence of Moore? I am of opinion that it was not necessary to obtain judgment against Moore in the first instance. The remedy given by the Ordinance is two-fold—a personal remedy against the debtor and another against his property. All that is necessary is to prove the existence of the debt on the land, on which being done the charge springs into existence without any judgment against the debtor. I declare that the Wainiaku estate

(1) S. 42 is as follows:—

“All moneys due by any employer under the provisions of this Ordinance in respect of any Immigrant whether the same shall be for the cost of introducing any such Immigrant into the Colony or returning him to the place where he was recruited or for his wages or his maintenance or treatment in hospital or in the Immigration Depot or any other moneys whatsoever which may be due and payable under any of the provisions of this Ordinance shall be a first charge on the real estate of his employer and shall be a preferable charge on the lands in respect of which the services of any such Immigrant shall be indentured over and above all encum-

brances charges and mortgages and all such moneys may be sued for and recovered in a summary manner as hereinafter provided.”

(2) S. 43 is as follows:—

“In case any plantation in respect of which any moneys may be due under the provisions of this Ordinance shall be sold by private contract or at execution sale or shall devolve by inheritance devise or otherwise the charge for all or any of such moneys mentioned in the section next preceding shall subsist and continue notwithstanding such sale and notwithstanding any transfer or transmission in consequence of such sale and notwithstanding any such devolution.”

is liable for all such moneys as may be due in respect of the return-passages of any immigrants indentured thereon as stated in the pleadings. There will be no order as to interest as I am of opinion that it is imposed as interest by way of penalty and can only be recovered by suing for it in a personal action against the employer. The estate was not charged with that when it passed on sale to the Bank. There need be no inquiry before the registrar as to what sums were due as the sum shown to be owing by Moore, namely 36*l.*, may be taken as the amount, and if that sum, but without interest, be not paid within three months the estate is ordered to be sold.

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*Judgment for plaintiff.*

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AGENT-GENERAL OF IMMIGRATION v. BANK OF  
NEW ZEALAND.\* (No. 1.)

*Summons to review taxation of costs—Civil Procedure Rules, r. 375—  
Supreme Court Rules—Order LXF., r. 1, 2—Supreme Court Rules,  
1893.*

No order for costs having been made at the trial of an action, and the plaintiff having taxed his costs in the usual way, the defendant took out a summons to review such taxation without giving the taxing-master the usual notice of objections.

*Held*, that such summons must be dismissed on the ground of irregularity, but that, as no order "awarding" costs had been made, the taxing-master had no authority to tax and this award must be set aside.

This was an application by summons on the part of the Bank of New Zealand asking for a review of taxation of the costs incurred in the recent action of *Agent-General of Immigration v. Moore and The Bank of New Zealand\** wherein an order was made against the

\* See last case. See next case.