[APPELLATE JURISDICTION.]

1895
Oct. 14.

POTTS *v.* MONGSTON.

Case stated—Appeals Ordinance 1876, *s.* 11—*Real Property Ordinance* 1876, *ss.* 49, 117—*Ordinance XV. of* 1889, *s.* 1—*Trespass.*

An appeal lies on a case stated under s. 11 of the Appeals Ordinance 1876 from the decision of a stipendiary magistrate dismissing a prosecution.

Agent-General of Immigration v. *J. C. Smith & Co.** approved.

A lessee in possession under an unregistered lease may take proceedings for trespass where such trespass has been committed by his lessor.

Quære, when such trespass has been committed by a stranger.

This was an appeal by way of case stated under s. 11 of the Appeals Ordinance 1876 from the decision of Mr. Stipendiary Langford (acting for the stipendiary magistrate at Naitonitoni), on the 21st August, dismissing a summons for trespass under s. 1 of Ordinance XV. of 1889, brought by P. C. T. Potts of Tamanua, against Oliver Mongston of Wainikavika, Navua.

The Attorney-General (Mr. Udal) for the appellant.

Mr. Scott for the respondent.

Before the case was opened, *Mr. Scott* took the preliminary objection that no appeal lay under s. 11 of the Appeals Ordinance 1876, inasmuch as the words of that section only contemplated appeals on the part of a party who was either convicted or was made the subject of some order under s. 3 of that Ordinance, and the present case was an appeal from a mere dismissal of the summons.

* *Ante* p. 144.

1895

POTTS v. MONGSTON.

The Attorney-General, in answer, cited the case of the *Agent-General of Immigration* v. *J. C. Smith & Co.** as establishing that a complainant whose case has been dismissed can apply for a case stated upon a point of law only.

His Honour, in overruling the objection, stated that the circumstances of the present case afforded no reason for his departing from his decision in the above case. The words of s. 11, although by no means as clear as they might be, allowed an appeal to *either* party on a point of law, the facts of the case as stated by the stipendiary magistrate being taken to be admitted. But an appeal under s. 3 could only be allowed to a person convicted of an offence or who had been made the subject of such an order as therein mentioned, and on such an appeal the facts of the case could be gone into. The words in s. 11, "and in which an appeal is allowed under the provisions of this Ordinance," must be taken to mean that the circumstances under which the appeal by way of a case stated on a point of law was brought would have allowed an appeal under s. 3 had the defendant been convicted or had been made the subject of such an order as therein mentioned, *i.e.*, had been called upon to pay a penalty exceeding 5*l*. In the present case, had the defendant being convicted by the stipendiary magistrate he might have been subjected to a penalty of 20*l*. It was therefore clearly a case in which an appeal would have been allowed under s. 3, and was properly the subject of an appeal by way of case stated under s. 11 on a point of law only. The appeal must therefore be heard.

The Attorney-General, for the appellant, read the case stated by the stipendiary magistrate, and also the notes of the evidence given in the Court below. From this it

* *Ante* p. 144.

appeared that in 1894 the appellant and respondent had been neighbours and friends, and had entered into negotiations for growing cane on certain lands at Wainikavika, Navua, in the occupation of the respondent. To give effect to these negotiations an agreement for a lease of a certain portion of the above lands for a period of three years, dated 31st August, 1894, was granted by the respondent to the appellant for the purpose of enabling the latter to grow cane upon it. By an agreement of even date therewith the appellant undertook to grow cane on the whole or part of the said land, and to engage the respondent to manage and generally to supervise the cultivation of the crops upon the terms that the respondent should share the profits in lieu of salary. Neither of these agreements was registered under the Real Property Ordinance, as no certificate of title had ever been issued in respect of the said land upon which the lease could have been indorsed, but both documents were registered in the Registrar-General's office for safe custody. The cultivation of the land was carried out under the above arrangement for some time, but eventually differences arose between the parties, the appellant alleging that the respondent neglected the cane, and eventually called in Mr. Tarby, the Fiji Sugar Company's cane inspector, to inspect the crops, who in July last gave a very unfavourable report of the state of cultivation. Matters shortly after this culminated in threats of violence being used by the respondent to the appellant when he came upon the plantation, and eventually the appellant gave the respondent twenty-four hours' notice of dismissal from his position as manager in consequence of his alleged misconduct and neglect. This notice the respondent declined to recognise, and refused to leave the plantation, whereupon the appellant

1895

POTTS v. MONGSTON.

took out a summons for trespass under s. 1 of Ordinance XV. of 1889. The case came on to be heard at Naitonitoni on 5th August before Mr. Stipendiary Hunter, and was adjourned on the application of the defendant until the 21st August, when it was heard and disposed of by Mr. Stipendiary Langford.

The defendant at the hearing adduced no evidence in rebuttal of the charges made against him by Mr. Potts, but relied upon the plea of want of jurisdiction, alleging that the question of title to land was involved in the proceedings. In the result the stipendiary magistrate dismissed the summons on the ground that inasmuch as the complainant claimed possession under an unregistered, and consequently invalid, lease he had no *locus standi* so as to enable him to take such proceedings for trespass.

The Attorney-General contended that the stipendiary magistrate's decision was not given on the point of law raised by the defendant at the hearing, namely, that the case involved a question of title, for as a matter of fact no *bonâ fide* claim of right had been raised or established (and he cited Stone's *Justice's Manual*, pp. 293 and 609, in support of his argument), but on the ground that the agreement for lease being unregistered under the Real Property Ordinance gave the complainant no valid right to possession upon which he could maintain proceedings for trespass under Ordinance XV. of 1889. He contended that a possessory title was sufficient to maintain trespass, and a possessory title was clearly recognised by the terms of s. 2 of Ordinance XXV. of 1879, and with it must follow a right to grant a lease, valid against all but the registered proprietor or his representatives. Possession of the land was taken by Mr. Potts under this agreement for lease, and he was in possession of it

still by the respondent as his manager; and although it was impossible that such lease could be registered under the Real Property Ordinance for the reasons stated, it was nevertheless a binding agreement upon Mr. Mongston who had granted it, and who could not now be heard to deny its validity as between himself and Mr. Potts. The respondent having chosen to place himself in the position of manager for the appellant the latter had a right to dismiss from his employment, and the respondent would have his remedy if dissatisfied.

Mr. Scott for the respondent denied that the appellant had such a right to possession as to enable him to take criminal proceedings for trespass under Ordinance XV. of 1889, and that the only remedy the appellant had was by way of civil proceedings, when the respondent would be in a better position to defend himself. The Ordinance in question which repealed the former summary proceedings for trespass, did not apply to such a case as the present one, and by the express words of s. 7 only allowed an appeal in the case of a conviction. The learned counsel argued that the agreement under which the respondent had to receive an equal share in the profits, in lieu of salary, was virtually one of partnership; that the respondent was a partner in the cane-growing arrangements and could not be so summarily dismissed; that he had never been out of possession of the land and was still there as the occupier, and that the appellant had never had actual possession of the premises, and could not therefore claim to bring the present proceedings for trespass. He also contended that the agreement for lease being unregistered under the Real Property Ordinance was invalid and conferred on the appellant no such rights as those now contended for, and that the stipendiary

1895

POTTS v. MONCRIEFF.

magistrate was therefore right in so dismissing the case.

The Attorney-General, in reply.

H. S. BERKELEY, C.J. This is an appeal by way of a case stated by the stipendiary magistrate on a point of law under s. 11 of the Appeals Ordinance 1876. It is urged upon me that the agreement for lease in question is invalid under s. 49 of the Real Property Ordinance 1876, for that, being a lease for a period exceeding one year, namely for three years, it was not registered as required by that Ordinance. If the case had been one between Mr. Potts and a stranger that argument might perhaps have been a good one; but as between the appellant and the respondent there may be a question whether, inasmuch as the latter is the lessor, he is now entitled to question the validity of the lease he gave.

At first, I was under the impression, that by reason of such non-registration, no liability would attach to the respondent; but then it was shown that it could not have been registered otherwise than it was, as no certificate of title was in existence upon which such registration could have been indorsed. The appellant therefore was not guilty of any laches in not having it so registered. The position between the parties is a peculiar one and of some difficulty, and involves careful consideration. Unless this matter is one capable of being dealt with summarily a great wrong would be done to the appellant. If he can't get rid of the respondent as his manager it will be only because of the invalidity of his lease, which the respondent himself granted—by a defect in fact of his lessor's title. Strictly speaking, the agreement is invalid as a lease, being for more than one

year and unregistered, but under s. 117* of the Real Property Ordinance, which favours the equities of matters, it forms a document which might have been given effect to. Therefore I consider that the respondent could not have revoked it, and that an equitable contract must be held to exist between the parties. Possession is in the appellant actually as lessee, and constructively also, through his manager. No partnership exists and it is clear that no partnership was intended. No liability for loss was incurred by the respondent; and it is clearly stated in Lindley on *Partnership* (p. 13) that a share of profits alone does not constitute a partnership. The respondent intended that the appellant should have the land for three years, and that he himself should be the manager for that period. The relation of master and servant accordingly existed between the parties, and the appellant therefore had a right to dismiss the respondent; but whether that right was properly exercised or not I express no opinion; if improperly, the respondent has his remedy. Has the appellant a right to bring proceedings for trespass? He had possession as before stated, and the relationship of master and servant having been established, Ordinance XV. of 1889 applies, and he has a right to ask the stipendiary magistrate on his servant declining to leave, to get rid of him for him. I think, therefore, there should have been a conviction by the stipendiary magistrate. In order to end the matter I will make an order altering the decision of the Court below from an order dismissing the summons into one imposing a fine of 20*l.* upon the

* S. 117 is as follows:—

"Nothing contained in this Ordinance shall take away or affect the jurisdiction of the Courts of law on the ground of actual fraud or over contracts for the sale or other disposition of land or over equitable interests generally."

1895

POTTS v. MONGSTON.

defendant, and, in default of payment, three months' imprisonment; such fine to be reduced to 10*s.* if possession of the premises be given up to the appellant by the respondent within fourteen days after the service of the order upon him.

Appeal allowed.

1896
Dec. 14, 16.

[ADMIRALTY JURISDICTION.]

GARRICK AND OTHERS *v.* OWNERS OF THE EXCELSIOR. THE COLLECTOR OF CUSTOMS AND MESSRS. CORBETT AND HUNT, CLAIMANTS.

Seamen's action for wages—Maritime lien—Statutory lien—Priority —Customs Regulation Ordinance 1895, *s.* 49.

The seamen of a ship having obtained an order for its sale in an action against the owners for wages, and the vessel having been sold and the proceeds paid into court in order to determine the priority of the various claimants,

Held, that, after payment of certain costs and charges, the statutory lien of the Collector of Customs for expenses incurred under s. 49 of the Customs Regulation Ordinance 1895 takes precedence of the maritime lien of the seamen for unpaid wages; and this maritime lien, again, takes precedence of a claim for necessaries supplied on the order of the master of the ship.

This was an action by the crew of the barque *Excelsior*, of Sydney, for wages.

Mr. Shaw for the plaintiffs and also for Messrs. Corbett & Hunt.

The Attorney-General (Mr. Udal) for the Collector of Customs.

The defendants were unrepresented. The case was heard on the 14th instant, when his Honour reserved