

POTTS *ats.* MONGSTON.

[Appellate Jurisdiction (Berkeley, C.J.) October 14, 1895.]

*Lessee in possession under unregistered lease—trespass by lessor—whether proceeding for trespass may be taken by lessee.*

In 1894 Potts and Mongston had been neighbours and friends, and had entered into negotiations for growing cane on certain land at Wainikavika, Navua, in the occupation of Mongston. As a result of these negotiations an agreement for a lease for a certain portion of the land for a period of three years, dated 31st August, 1894, was granted by Mongston to Potts for the purpose of enabling the latter to grow cane. By an agreement of even date Potts undertook to grow cane on the whole or part of the land, and to engage Mongston to manage and generally to supervise the cultivation of the crops upon the terms that Mongston should share the profits in lieu of salary. Neither of these agreements was registered under the Real Property Ordinance,<sup>1</sup> as no certificate of title had ever been issued in respect of the land upon which the lease could have been endorsed, but both documents were deposited 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, Potts alleging that Mongston neglected the cane, and eventually called in Mr. Tarby, the Fiji Sugar Company's cane inspector, to inspect the crops, who gave a very unfavourable report of the state of cultivation. Matters shortly after this culminated in threats of violence being used by Mongston to Potts when he came upon the plantation, and eventually Potts gave Mongston twenty-four hours' notice of dismissal from his position as manager in consequence of his alleged misconduct and neglect. This notice Mongston declined to recognize, and refused to leave the plantation, whereupon Potts took out a summons for trespass under s. 1 of Ordinance XV of 1889.

Mongston at the hearing adduced no evidence in rebuttal of the charges made against him by 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 proceedings for trespass.

**HELD.**—The lessee under an unregistered lease may take proceedings for trespass against the lessor.

*Quaere* : When trespass committed by a stranger ?

[**EDITORIAL NOTE.**—The “ proceedings for trespass ” in this case were taken under the repealed Ordinance XV of 1889,<sup>2</sup> s. 3 whereof was as follows :—

“ 3. Every person shall on conviction in a summary way before a magistrate in each of the following cases be liable to a penalty not exceeding twenty pounds and in default of payment to be imprisoned with or without hard labour for any period not exceeding three months :—  
 “ (1) If he shall unlawfully persist in coming or remaining upon any plantation land or premises after being warned not to come thereon or to depart therefrom.”

<sup>1</sup> Repealed. *Vide Land (Transfer and Registration) Ordinance (Cap. 120) s. 18. (Revised Edition, Vol. II, p. 1216.)*

<sup>2</sup> An Ordinance to amend the Summary Conviction Offences Ordinance, 1876.

See now Penal Code, Cap. 5, ss. 85, 86, 209.

See also *The Colonial Sugar Refining Company Limited v. Seodatt* [1941] 1 Fiji L.R. and *Jainab ats. Police* [1934] 1 Fiji L.R.]

APPEAL by way of case stated under s. 11 of the Appeals Ordinance 1876 from the decision of a stipendiary magistrate dismissing a summons for trespass under s. 1 of Ordinance XV of 1889.

The Attorney-General, *J. S. Udal*, for the appellant 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 bona 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 clearly recognized by the terms of s. 2, Lands Claims Ordinance, 1879<sup>1</sup>, 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.

*W. 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 agreement under which the respondent had to receive an equal share in the profits, in lieu of salary, was virtually one of partnership; the respondent was a partner in the cane-growing arrangements and could not be so summarily dismissed; he had never been out of possession of the land and was still there as the occupier, and 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

<sup>1</sup> The Lands Claims Ordinance, 1879, s. 2 (*Rep.*) was as follows:—"In this Ordinance the term 'indefeasible' when applied to a Crown grant or certificate of title, means that such a grant or certificate of title shall be taken by all courts of law as conclusive evidence that the person named therein as grantee or proprietor is the absolute owner of the land therein described for the estate or interest therein mentioned; and that the title of such grantee or proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation, to which he shall have been proved to be a party, or on the ground of adverse possession in another, subsequent to the date of such grant, for the prescriptive period." Vide now Land (Transfer and Registration) Ordinance (Cap. 120) s. 14.

invalid and conferred on the appellant no such rights as those now contended for, and that the stipendiary magistrate was therefore right in so dismissing the case.

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,<sup>1</sup> 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 endorsed. 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<sup>2</sup> 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

<sup>1</sup> (*Rep.*). Vide now *Land (Transfer and Registration) Ordinance* (*Cap.* 120) s. 25 (*Revised Edition*, p. 1218) and s. 43 (*Revised Edition*, p. 1223).

<sup>2</sup> (*Rep.*). S. 117 was as follows:—"Nothing contained in this Ordinance shall take away or effect 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." See now s. 183 of the *Land (Transfer and Registration) Ordinance* (*Cap.* 120) *Revised Edition*, p. 1266.)

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, upon defendant, and, in default of payment, three month's imprisonment ; such fine to be reduced to 10s. 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.

## GARRICK AND OTHERS *v.* OWNERS OF THE *EXCELSIOR.*

[Admiralty Jurisdiction (Berkeley, C.J.) December 16, 1896.]

*Seamen's action for wages—Maritime lien—Statutory lien—Priority—Customs Regulation Ordinance 1881—1895, s. 49.*<sup>1</sup>

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, the priority of various claimants was in issue.

**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 1881—1895<sup>1</sup> takes precedence over the maritime lien of the seamen for unpaid wages ; and the maritime lien, again takes precedence of a claim for necessaries supplied on the order of the master of the ship.

Cases referred to :—

(1) *The Gustaf* [1862] 31 L.J.P.M. & A. 207 ; 6 L.T. 660 ; 41 Dig. 932.

(2) *The Immacolata Concezione* [1883] L.R. 9—P.D. 37 ; 52 L.J.P. 19 ; 50 L.T. 539 ; 41 Dig. 935.

**ACTION** by the crew of the barque, *Excelsior*, of Sydney, for wages. The facts are fully set out in the judgment.

*H. Shaw* for the plaintiffs and also for Messrs. Corbett & Hunt.

The Attorney-General, *J. S. Udal*, for the Collector of Customs. The defendants were unrepresented.

**H. S. BERKELEY, C.J.**—In this case the plaintiffs, the seamen of the ship *Excelsior*, have obtained an order for the sale of the ship in an action for their wages. The ship has been sold and the proceeds have been paid into court. In addition to the claim by the plaintiffs, claims against the proceeds are made by the Collector of Customs for moneys expended by him under the provisions of s. 49 of the Customs Regulation Ordinance 1895,<sup>1</sup> and by Messrs. Corbett & Hunt for meat supplied. The facts on which the question now to be determined arises are (so far as they are material) as follows :—The chartered sailing vessel, the ship, *Excelsior* ; arrived in cargo at Suva on the 16th May last. On

<sup>1</sup> *Now Customs Ordinance (Cap. 147) s. 139 (Revised Edition, p. 1538).*