1897

THE QUEEN v. MARTELL.

of Fiji has *original* jurisdiction to hear and determine any civil or criminal cause or matter arising at any place within the limits of the Order in Council, and may do so either according to the procedure usual in Fiji, or according to the procedure under the Order. Further, that under s. 4 of the Indictable Offences Ordinance 1876, a British subject, if found in Fiji, may be properly committed for trial by a stipendiary magistrate there, wherever the offence might have been committed, if the offence be one cognisable by the Supreme Court.

Objection overruled.

[His Honour, subsequently, at the request of the counsel for the defence, reserved the point for further consideration by the Court of Crown Cases Reserved under s. 44 of "The Criminal Procedure Ordinance 1875," but in the event which happened, namely, the acquittal of the accused, such further consideration was not necessary.]

Oct. 27.

[APPELLATE JURISDICTION.]

EMOSI BASU AND OTHERS *v.* THE QUEEN.

Appeal from Provincial Court—Native Regulation II. of 1877, *s.* 3—*Appeals Ordinance* 1876, *s.* 3.

No appeal lies from a conviction by a Provincial Court, the Appeals Ordinance 1876 only applying to *European* Courts of summary jurisdiction.

This was an appeal from a decision of the Bau Provincial Court on the 9th October whereby one Emosi Basu and some forty-eight other natives of Nakelo in the Rewa district were convicted of having assaulted two other natives belonging to Natogadravu with intent to do them grievous bodily harm and were sentenced to terms of imprisonment varying from two years to one

year, and to Emosi was awarded the additional punishment of flogging. The assault occurred on the 13th September and arose out of a dispute as to the land boundary between the districts of Nakelo and Natogadravu, when the natives of the former district assembled in large numbers and interrupted for some time the work of the Native Land Boundary Commission decided upon by the Governor in Council and then being carried out under the superintendence of the Native Lands Commissioner and the Government surveyor.

Mr. Garrick and *Mr. H. G. Berkeley* for the appellants.

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

After the notice of appeal had been amended and security for costs ordered to be given on the motion of the Attorney-General, the latter raised the objection that no appeal lay in the present case.

His Honour decided that this point should be argued first.

The Attorney-General referred to s. 3 of Native Regulation II. of 1877 which provides: that "no appeal shall lie against any conviction by the Provincial Court," and contended that this Regulation, being by s. of "The Native Affairs Regulation Ordinance 1876," clothed with the force of law upon being approved by the Legislative Council, expressly took away any right of appeal which might otherwise have existed.

Mr. Garrick, for the appellants, contended that s. 8 of the above Ordinance did not take away such right of appeal, and referred to s. 9 in order to show that the Native Regulation Board had no power to make regulations that are "repugnant to any law or Ordinance in force in the Colony." This law was repugnant to the

1897

EMOSI BASU v. THE QUEEN.

Appeals Ordinance 1876 which, by s. 3, gave an absolute right of appeal from any order of a Court of summary jurisdiction. He argued that a mere regulation could not take away a right expressly conferred by statute, and that a mere power to regulate procedure could not authorise the taking away of a right to appeal expressly given by statute.

Mr. Berkeley followed on the same side, and, referring to s. 8 of the above Ordinance, contended that there was nothing in that section to limit the jurisdiction of the Supreme Court, and that it only applied to matters of procedure. The only jurisdiction the Provincial Court had was over the list of offences shown in Part I. of Regulation II. of 1877, and the present case was one cognisable by the Supreme Court on indictment. The offence to be cognisable by the Provincial Court must come under the head of "common assault" in such list which is more easily seen by the Fijian equivalent expression. Regulation X. of 1877, under which this prosecution is said to have been undertaken, is no new Regulation but simply provides the punishment for "common assault" contained in the above list. He further referred to ss. 10, 11, 12, of Native Affairs Regulation Ordinance 1876, which regulated the appointment and duties of Native stipendiary magistrates and which showed, that they had the same powers conferred on them both in summary and indictable offences as had European stipendiary magistrates.

The Attorney-General, in reply, contended that by virtue of s. 3 of Native Regulation II. of 1877, which had the force of law conferred upon it by an Ordinance later in time than the Appeals Ordinance, the right of appeal from a decision of a Provincial Court was absolutely taken away even had such a Regulation been

at variance with the Appeals Ordinance 1876. S. 3 of that Ordinance did not say that an appeal could lie in cases where such a right had been expressly taken away as here.

He submitted that the Appeals Ordinance did not apply to Provincial Courts at all. At the time of passing the Appeals Ordinance they were not in existence, and internal evidence of the Ordinance itself would show that its provisions were not intended to refer to such courts. There was no such thing as an absolute right of appeal. The right was a creation of statute, and, by the words of s. 3, appeals were only allowed from orders "made by a magistrate in the exercise of his summary jurisdiction." The present appeal was from *two* magistrates who had a very wide jurisdiction given them over natives *inter se*, and who did not exercise summary jurisdiction, though they decided matters in a summary way, including appeals from the District Courts. And a reference to the notices of appeal and the forms of such notices given in the schedule to the Ordinance would show that they were inapplicable to the constitution and procedure of the Provincial Courts. It was, therefore, clearly to be inferred that s. 3 was only intended to refer to *European* Courts of summary jurisdiction.

SIR H. S. BERKELEY, C.J. I do not think that any appeal lies in this case. The jurisdiction of the Supreme Court to hear an appeal rests exclusively upon a power conferred by a statute granting a right of appeal. No such jurisdiction exists unless it is clear that such power has expressly been conferred.

In considering this question the nature of the court from which this appeal comes must be considered, the date of its appointment and constitution, and what

1897

EMOSI BASU v. THE QUEEN.

authority there is in this Court to hear appeals from it. A Provincial Court is a court of summary jurisdiction; but the determination of this case does not turn solely upon that, because it may be a Court of summary jurisdiction and yet no appeal may lie from it. It is not because a court is a court of summary jurisdiction that therefore there is an appeal from it. This right of appeal is not inherent in the subject as is the right to appeal to the Queen in Council, for to intermediate courts of judicature there are no such rights. For this reason the Legislature may choose to give a right of appeal to one court and not to another. There are in this Colony two courts of summary jurisdiction, one European, and the other European and Native. It is clear that there is a right of appeal from such European court given by s. 3 of the Appeals Ordinance 1876. Unless taken away, therefore, there is in such cases a right of appeal. When that Ordinance was passed the only court of summary jurisdiction was the European one. Section 3 of that Ordinance only refers to European stipendiary magistrates and to those only.

The Provincial Court was not then in existence. Subsequently, in the same year, Provincial Courts came into existence and I am now asked to say, by inference, that a right of appeal is given to those courts by that Ordinance. But courts will not lean to deduction from inference in matters of appeal. Here there is no express enactment, and the only words from which any such inference might be drawn are as follows:—

> Any person who shall be convicted of any offence or against whom an order shall be made by a magistrate in the exercise of his summary jurisdiction. (Section 3.)

The present case, however, is not an appeal from such a conviction or order; it is from that of *two* magistrates;

and I see no such words here as would include an order made by a Provincial Court within the category of an order made by a magistrate in the exercise of his summary jurisdiction, which is the foundation of an appeal to the Supreme Court. Provincial Courts are of entirely different procedure and deal with a very different class of persons. Again, the machinery given by the Appeals Ordinance 1876 is not applicable to the appeals from Provincial Courts; for instance, the provisions referring to notices of appeal that are required to be given are inapplicable to such courts. It is clear that the Legislature never intended here to confer a right of appeal to such courts, and no attempt since the Ordinance has been passed until now has been made to contend that it had.

I decide this apart altogether from the question of there being any express enactment existing in the shape of any Native Regulation or otherwise to take away the right of appeal from Provincial Courts, which may depend upon whether such an enactment is a matter of "procedure" or not, and which is a question which it is not necessary now for me to decide.

I hold, accordingly, that no appeal lies in this case, and that it be dismissed with costs.

Of course if any abuse is shown to exist—either in any proceeding before or in the exercise of any jurisdiction by a Provincial Court—this Court has an inherent right to interfere upon its assistance being invoked in the proper manner; but in the present case I merely hold that no appeal lies from a conviction by a Provincial Court.

Appeal dismissed with costs.