[HIGH COURT OF AUSTRALIA.]

YOUNG AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

TOCKASSIE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June 5th.*

Griffith C.J., Barton and O'Connor JJ.

*Pacific Island Labourers Act* 1880 (*Queensland*), (44 *Vict. No.* 17), *sec.* 47—*Pacific Island Labourers Act Amendment Act* 1884 (*Queensland*), (47 *Vict. No.* 12), *sec.* 3—*Regulation—Inconsistency—Ultra vires—Deduction of wages during sickness.*

The *Pacific Island Labourers Act Amendment Act* 1884 provides (sec. 3) that "all agreements for service made with Islanders whether the stipulated time for their return to their native islands has arrived or not shall be in the form in Schedule G to the principal Act or to the like effect," &c.

Schedule G contains, *inter alia*, a provision that no wages shall be deducted for medical attendance.

By section 47 of the Act of 1880 the Governor-in-Council is empowered to make regulations "not inconsistent with the provisions of the Act for the due and effectual execution of the provisions thereof and respecting any matter or thing necessary to give effect to the objects of this Act," &c. A regulation, purporting to be made in pursuance of this section, was made on 25th February, 1896, which provided (No. 5) that "No employer of a time-expired Islander shall be required to pay the wages of any such Islander during sickness," &c.

In a proceeding by respondent, a time-expired Islander, to recover a sum of money representing wages deducted by his employer during sickness:

*Held*, affirming the decision of the Supreme Court of Queensland, that regulation 5 did not fall within the enabling words of sec. 47 of the Act, and was consequently inoperative to alter the law by which the parties to the engagement were governed, and that as the actual written agreement for service contained no stipulation for such a deduction, the respondent was entitled to recover.

APPEAL, by special leave, from a decision of the Supreme Court of Queensland.

The facts of the case appear fully in the judgment of the Court.

*Feez* (with him *Lilley*), for appellants. By regulation 5, made under the *Pacific Island Labourers Act Amendment Act* 1884, "No employer of a time-expired Islander shall be required to pay the wages of any such Islander during sickness . . . &c." The regulation is binding, being made for the due and effectual execution of the Act, and therefore being within the powers conferred by sec. 47 of the Act.

[GRIFFITH C.J.—How is the regulation of the conditions of an agreement between master and servant a regulation for the due and effectual execution of the provisions of the Act ?]

It is one of the objects of the Act to regulate the formation and carrying out of agreements between master and servant. The regulations are in every way consistent with the Act. This regulation merely adds a term to those required by the Act. Two of the main objects of the Act were (I.) to provide for Islanders being properly treated and getting proper wages, and (II.) to provide them with medical comforts during sickness. These necessitated the regulation of agreements between masters and Islanders.

[GRIFFITH C.J.—Would not the regulation, if valid, have the effect of altering the common law ?]

The regulation may alter the law so long as it is for the due and effectual execution of the Act. This is a regulation which purports to be made under the Act, and unless there are very strong reasons for saying it is entirely outside the scope of the Act, the Court will not avoid it: *Slattery* v. *Naylor* (1); *Institute of Patent Agents* v. *Lockwood* (2).

[GRIFFITH C.J.—The question is whether this regulation is within the power given by the Act to make regulations.]

Where the object of an Act is to provide for the importation of labour, the regulation of agreements between labourers and their masters must come within its purview. The State is according

(1) 13 App. Cas., 446, at p. 453. (2) (1894) A.C., 347.

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to the spirit of the Act *in loco parentis* to these Islanders, and anything in the agreement which might be for their benefit comes within the scope of the Act.

[O'CONNOR J. — Does not this regulation supply a *casus omissus* in the Act ?]

Yes; but it is not for that reason outside the general scope of the Act.

[GRIFFITH C.J.—Assuming the regulation is not within the power given by the Act, then arises a question of fact as to the conditions of the agreement actually made.]

If the regulation is not within the scope of the powers given by sec. 47 of the Act, it would be necessary to pass a special Act of Parliament in order to make any regulation in their favour.

[GRIFFITH C.J.—Or it might be done by agreement.]

The effect of the regulation is that its provisions are to be implied in all contracts of this kind: *Hornbrook* v. *Hyne* (1). The magistrate found that the provisions of this regulation must be taken to have been within the knowledge of both parties. Where a contract has been reduced to writing verbal evidence may be admitted to prove a general custom: *Burgess* v. *Wickham* (2); even though the contract is required by Statute to be in writing.

[*Lukin*, for respondent, referred to *Evans* v. *Roe* (3).]

The Act endeavours to secure to each Islander the full benefit of his labour and not to allow him to be penalized (*e.g.* by reduction in wages) on account of his fellow-labourer. The Act itself deals with deductions in secs. 21 and 22. The Regulation means that if the Islander is well during the whole term of service he shall suffer no deduction. The regulation is therefore in favour of the Islander, and not inconsistent with the Act. The Act aimed also at providing a form of agreement which could be readily understood by the Islander. This aim would be defeated if all the terms imposed by the Statute were included in the written agreement. The duty of the employer to provide medicine and medical attendance (sec. 24) is not included in the agreement; nor to maintain an Islander when his term of service has expired. Regulation 8, prohibiting any deduction from wages on account

(1) 8 Q.L.J., 17.
(2) 33 L.J. Q.B., 17.
(3) L.R. 7 C.P., 138.

of time lost by sickness as the result of accidents incurred while an Islander at work, is a qualification of regulation 5, and if the one is *ultra vires* so must the other be.

*Lukin*, for respondent. The Regulation is *ultra vires* in the following respects :—(I.) It is not for the due and effectual execution of the provisions of the Act. (II.) It is not respecting a matter necessary to give effect to the objects of the Act; and (III.) It is inconsistent in that (*a*) it does not follow the form of agreement in the Schedule, and (*b*) it provides that the amount to be paid might in certain events be less than £6 which is the minimum prescribed by the Act.

Inasmuch as the regulation alters the law, it cannot be said to be for the due and effectual execution of the provisions of the Act: *Kinnaird* v. *Correy* (1).

The Act 47 Vict. No. 12 requires all agreements with Pacific Islanders to be made in the form in Schedule G or to the like effect (sec. 3); and makes it unlawful to employ any Islander except under an agreement for service attested as provided (sec. 10). Sec. 12 imposes a penalty for any offence against the provisions of the Act. The result of these sections is to prevent an employer entering into an agreement otherwise than in the form of Schedule G or to the like effect, and to provide a penalty for any breach. One of the rights of an Islander under Schedule G is to receive wages during illness. The effect of the regulation is therefore to deprive the Islander of one of his rights under the Act. The regulation here is wholly inconsistent with the form in Schedule G. It is impossible for both to stand together and operate without either interfering with the other: *Tabernacle Permanent Building Society* v. *Knight* (2). [As to the amount of deference to be paid by the Court to regulations made by the executive and administrative departments, he cited *Hardcastle on Statutes* (1901 ed.), p. 285.] It has been held that a rule, giving a Judge power on setting aside a bankruptcy notice to declare that no act of bankruptcy has been committed, was *ultra vires* sec. 119 of the New South Wales *Bankruptcy Act* (No. 25 of 1898),

(1) (1898) 2 Q.B., 578.
(2) (1892) A.C., 298; *per Halsbury* L.C., at p. 302; and *per Herschell* L.J., at p. 306.

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giving power to frame rules "for the purpose of regulating any matter" under the Act: *King* v. *Henderson* (1). The legislature did not intend to allow any alteration of the schedules to be made by regulation unless expressly authorized. This appears from the wording of sec. 7 of 55 Vict. No. 38 (Queensland). The whole question is whether the regulation is inconsistent with the provisions of the Act.

[GRIFFITH C.J.—When a Statute says that its provisions are to obtain except so far as they may be "inconsistent" with a previous Statute, the inconsistency connoted must be one "so at variance with the machinery and procedure indicated by the previous Act that, if that obligation were added, the machinery of the previous Act would not work." *Re Knight and Tabernacle Permanent Building Society* (2).]

This power is somewhat analogous to the power given to local authorities to make by-laws and impose penalties: *Metropolitan Transit Commissioners* v. *Bury* (3); *Reg.* v. *Shuter, ex parte Wren* (4).

*Lilley*, in reply, cited *Netherseal Colliery Co.* v. *Bourne* (5).

The judgment of the Court was delivered by

GRIFFITH C.J. This proceeding was taken before the Court of Petty Sessions under the *Masters and Servants Act*, by the respondent, who was a Pacific Islander, against his employers, for the recovery of a balance of 25s. deducted from his wages during the period that he was incapacitated from work by illness. The magistrate held that the sum of money was not recoverable. On appeal to the Supreme Court they held that it was, and directed judgment to be given for the respondent. Although 25s. only is nominally involved, we are told that many hundreds, indeed thousands, of pounds are involved in the decision. The question arises in this way:—Under the Pacific Islanders' Acts, which regulated very carefully the introduction, and still regulate the employment, of Pacific Islanders, provision is made that the agree-

(1) (1898) A.C., 720.
(2) 60 L.J. Q.B., 633; *per Fry*, L.J.
(3) 9 Q.L.J., 117.
(4) 8 V.L.R. (L.), 138.
(5) 14 App. Cas., 228.

ments with the Islanders shall be in writing in the form given in Schedule G of the Principal Act of 1880 or to the like effect, and shall be attested by the Inspector, who is to retain a copy. Schedule G is in this form :—

"MEMORANDUM OF AGREEMENT made this day between . . . of . . . of the first part, and the undersigned labourer from the Island of . . . , per ship . . . , of the second part. The conditions are that the said part of the second part engage to serve the said party of the first part as . . . and otherwise to make . . . generally useful for the term of six calendar months, and also to obey all . . . or . . . overseer's or authorized agent's lawful and reasonable commands during that period, in consideration of which services the said party of the first part doth hereby agree to pay the said part . . . of the second part wages at the rate of . . . [*not less than six pounds (£6)*] per annum each, to provide . . . with the understated rations and clothing, as well as proper lodging accommodation and bedding, and to defray the expenses of . . . conveyance to the place at which . . . to be employed, and to pay wages in the coin of the realm at the end of each six months of the agreement, and provide . . . with a return passage to . . . native island at the end of this engagement. No wages shall be deducted for medical attendance."

Then follow schedules of daily rations and clothing, and at the foot is a certificate : "The above contract was explained in my presence to the said labourers, and signed before me by them with . . . names or marks, and by the employer or his authorized agent, at . . . this . . . day of . . . 18 .

"Immigration Agent [or duly appointed officer.]

"Registered at the Immigration Office, Brisbane, this . . . day of . . . 18 ." And then it is to be registered at the Immigration Office in Brisbane.

That Schedule applied at first only to Islanders on their first introduction, who were not allowed to leave their ship until an agreement to that effect was signed. Later, in 1884, an Amendment Act provided that "All agreements for service made with Islanders, whether the stipulated time for their return to their native islands has arrived or not, shall be in the form in Schedule

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G to the Principal Act or to the like effect, and shall be made in duplicate, and attested by the immigration agent or an inspector, who shall retain one copy of the agreement, provided that the term of service specified in any such agreement may be any period not exceeding three years."

At that time a number of Islanders, having served their first period of three years, were not desirous of returning to their islands immediately, and they were often re-engaged. Sec. 47 of the Act of 1880 provides that:—"The Governor-in-Council may make regulations not inconsistent with the provisions of this Act for the due and effectual execution thereof, and respecting any matter or thing necessary to give effect to the objects of this Act and all such regulations shall forthwith be published in the *Gazette*, and shall thereafter have the force of law." Purporting to act under that power, the Governor-in-Council on 25th February, 1896, made regulations, one of which (No. 5), is in the following words: "No employer of a time-expired Islander"—this is a case of a time-expired Islander—"shall be required to pay the wages of any such Islander during sickness; but it shall be incumbent upon the employer to provide all necessary medical attendance in the same manner and to the same extent as if he had been the first or original employer of such Islander." Then there is a proviso which it is not necessary to read. Now, under the agreement in the form in Schedule G the employer would be liable at common law to pay wages for the full period, although the employé was prevented by sickness from doing his work during portion of the time. Then regulation 8 provided that:—"No deduction from the wages of a time-expired Islander, on account of time lost through sickness, shall be permitted, where such sickness is the result of an accident which has occurred while the Islander was at work." That is evidently intended to qualify regulation 5.

When the case came before the magistrate the main question that arose was whether regulation 5 governed the case. On the part of the employer it was set up as a regulation made under the powers conferred by sec. 47, and having, in the terms of that section, the force of law. If that is so, the deduction was properly made, and the employers are entitled to succeed. If on the other hand it had not the force of law, or was invalid or

inoperative for any reason, then different considerations arise. The question on this appeal, which we considered of sufficient importance to justify us in giving special leave to appeal, is whether that regulation can be considered valid in the sense of having the force of law so as to alter the common law which governs the construction of agreements between Islanders and their employers made in the form given in Schedule G to the Act of 1880. The learned magistrate was of opinion that the regulation was valid, and had the force of law, but on appeal the Supreme Court held, as I understand, that the regulation was invalid so far as it purported to alter the law, that is to say, so far as it purported to exclude the operation of the common law in the case of agreements made in the form in Schedule G. They held also that it was not invalid in the sense that it would be unlawful for an employer to enter into an agreement with an Islander on the terms expressed in the regulation. The words *ultra vires* were used in the course of the judgment, and have been used in the argument which has been addressed to us, in a double sense. A regulation or a by-law may be *ultra vires* in the sense that it deals with a subject not within the scope of the power conferred upon the delegated legislative authority, or it may be *ultra vires* because, although dealing with such a subject, it exceeds the prescribed limits within which the authority may be exercised. In the present case the question is whether the regulation is within the scope of the power conferred at all? The authority given is to make regulations for the due and effectual execution of the Act or respecting some matter or thing necessary to give effect to the objects of the Act. We asked the learned counsel for the appellants what was the provision of the Act for the due and effectual execution whereof this regulation was necessary or relevant, but did not receive any satisfactory answer. We asked again: What matter or thing necessary to give effect to the objects of the Act does this regulation relate to? The effect of the regulation, if valid, is to say that a rule of the common law applicable to agreements made in the form given in Schedule G in the Act shall no longer be applicable to them. That would be an distinct alteration of the law as to the construction of agreements made in the prescribed form. I confess

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to my total inability to see how the power to make regulations for the due and effectual execution of the Act, and with respect to the matters and things necessary to give effect to its objects, authorizes regulations to alter the law as to the obligations of masters and servants under an agreement drawn up in a particular prescribed form. In that sense, therefore, this regulation may be said either not to be a regulation at all within the meaning of the Act, or to be *ultra vires* regarded as a regulation. It may be or it may not be a perfectly legitimate exercise of the authority of the Governor-in-Council to give instructions to the officers, who are charged with the administration of the Act, as to the terms in which agreements may be made with Islanders; but in order to effect the result claimed by the appellants it must have the effect of altering the law regulating the mutual obligations of employers and employés. We can see nothing in sec. 47 to authorize regulations to be made for any such purpose. It follows that, in one view, this regulation is not a regulation at all within the meaning of that section, and, in another view, that, so far as it purports to be a regulation within the meaning of the section, it is invalid and inoperative as an exercise of legislative authority. Then the case stands thus:—We have an agreement in writing in the form given in Schedule G, made between the respondent and the appellants. Under that agreement the respondent is entitled to certain rights, one of which is that he shall be paid his wages without any deduction for absence from illness. The law governing the construction of documents is well settled. As *Blackburn* J. said, in the case of *Burges* v. *Wickham* (1), the incidents impliedly contained in a written contract, whether by construction of the terms or by implication of the law, are within the general rule, and cannot be varied or abrogated by extrinsic evidence. The only way in which they can be varied or abrogated is by proof of a general user, a user so well known that everyone making a contract in the terms used must be taken to have contracted with respect to that user. In this case the agreement was in writing, and there was no evidence of any such user. The magistrate seems to have thought, and not unnaturally perhaps, that this regulation having been promulgated in 1896, and, as he says,

(1) 33 L.J.Q.B., 17.

explained by the Inspectors to the Islanders, any agreement entered into by them must be taken to have impliedly included as part of the contract the condition prescribed by the regulation. That is not an unnatural conclusion, but in law it amounts to no more than a verbal agreement to vary a written contract, and, being merely verbal and not in writing, it cannot affect the construction of the contract. The contract therefore remains between the employer and employé in writing, and there is no variation of which the law can take notice, and under it the respondent is entitled to recover his wages without the deduction claimed. The decision of the magistrate was therefore wrong, and the decision of the Supreme Court must be affirmed. The learned Judges further expressed an opinion that the regulation was not *ultra vires* in the second sense to which I have referred, that is, treating it as a direction given to officers of the department to approve of agreements made in such a form as to be in conformity with it. Upon that point it is not necessary for us to express an opinion.

*Appeal dismissed with costs.*

Solicitors, for appellants, *Osborne & Waugh* for *F. W. Payne.*

Solicitors, for respondent, *Nicol, Robinson & Fox* for *H. N. Thorburn.*

H. E. M.