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Hawaiian Gazette.

WEDNESDAY, NOVEMBER 12 1884

Supreme Court of the Hawaiian Islands.—In Banco.

J. O. DAVIS ET ALS. VS. APUNG.

Judd, C. J. McCully, J. Austin J. Opinion of the Court by Judd C. J.

This is a case appealed from the Commissioners of private ways and water rights of the District of Waialua, Oahu.

Counsel for the defendant moved to dismiss the appeal for want of jurisdiction in the Commissioners upon the case stated by the record and the judgment thereon. The Court overruled the motion upon the following considerations.

By the record it appears that the defendant was duly summoned before the Commissioners "to answer to the demand or complaint 'E.,' of J. O. Davis and other plaintiffs named, that the said Afung had wrongfully taken the water of the springs of 'Kalie' and 'Pahukii' to the injury and damage of the water rights of the plaintiffs at 'Paukauwila' and on the lands adjoining at Kamooloa on the north."

The sole provision for the jurisdiction of the Commissioners is found in Section 997 of the Code, as amended by act of 1860, which reads thus "It shall be the duty of such Commissioners to hear and determine all controversies respecting rights of way and rights of water between private individuals or between private individuals and the Government," and in Section 998, as amended by Chapter 19 of 1878, that "In settling such controversies the Commissioners shall give such decision as may in each particular case appear to them to be just and equitable between the parties interested."

The defendant coming in on the summons and joining issue on the claim of plaintiffs there was clearly a "controversy" of the subject matter within the jurisdiction of these Commissioners. This Court in a recent case not reported, dismissed a case for want of jurisdiction where it appeared that one Ahuna applied to the Commissioners to determine his water rights without setting forth a claim as against other parties, and the Commissioners proceeded to adjudicate upon his rights of water without making other persons whose rights were claimed to be affected, parties to the adjudication. The decision was merely a declaration or exposition of the plaintiffs' right to certain water, made ex parte and no opportunity to be heard was afforded those who claimed that their rights were affected by the plaintiffs' claim. We held that as the record failed to disclose any "controversy" between plaintiff and other parties, the Commissioners were without jurisdiction.

The Commissioners it is conceded are not authorized to award damages for wrongful diversion of water. Such a matter should be the subject of a civil action in the proper Court.

But it is claimed by defendant's counsel that the Commissioners have not jurisdiction to order obstructions to water channels removed, as dams, troughs or drains, or to order banks of water courses restored, or to forbid the erection of obstructions, and in short, to exercise the functions of a Court of Equity applicable to the subject matter.

The counsel claim that the Commissioners have jurisdiction only to declare what the respective rights of the parties are and to prescribe the times of use of the water in each claimant or the distributive share of the same, and the rights being settled Equity must be resorted to in order to protect the enjoyment of the right or to redress infringements upon it.

We do not think the Legislature intended any such limitation of the jurisdiction of the Commissioners. They are authorized, as we have seen, to render such decision as may in each particular case appear to them to be just and equitable between the parties interested, and they "have the like power to summon witnesses, to punish contempts, and grant adjournments, to subpoena and compel the attendance of witnesses, to enforce judgments and issue execution for costs as conferred by law on Police Courts." p. 296 Compiled Laws.

We construe this as giving the authority to the Commissioners to make such orders as may be legitimate and necessary to the effectual enforcement of their judgment. We think the Legislature did not intend to compel parties to establish their rights in one forum and oblige them to resort to another forum to have these rights enforced or protected. The very object of a special Court of Commissioners in each election district supposed to possess special knowledge for this purpose to settle controversies respecting rights of way and water rights was to create a forum for the complete adjudication of such matters subject to appeal. This Commission cannot, of course, create new privileges nor apportion and distribute water arbitrarily without reference to its title.

A controversy must appear. It is difficult to know how a controversy could be occasioned except by one party taking more than his accustomed supply of water and to accomplish this by building dams or increasing the size of old dams or increasing ditches or doing some act which must be stopped in order to restore matters to the condition they were in when the acts complained of were done, if the act complained of should be found to be in contravention of the plaintiff's right.

On reference to the numerous cases decided by this Court on appeal it will be seen that many questions as to the removal of dams and other obstructions have been passed upon by the Court.

The Counsel for defendant objected to the introduction on appeal of the evidence of witnesses who testified before the Commissioners. The statute, p. 295 Compiled Laws, prescribes that "the Circuit Court or Supreme Court shall hear and determine the case in Banco and allow the introduction of new evidence."

This is far different from the language used in appeals from the Commissioners of boundaries which prescribes that the record of the Commissioners be read in evidence "and the Court shall allow the introduction of the evidence of witnesses whose testimony is not on record, but not otherwise." Compiled Laws p. 330. It also differs from the statute concerning appeals to the full Court from the decision of a single Justice thereof. There the law reads that "no new evidence shall be introduced in the Court above, provided always, that the Court above may in case evidence is offered which is clearly newly discovered evidence, and material to the just decision of the appeal, admit the same." Compiled Laws p. 244.

On the appeals from Commissioners of private ways and water rights, "new evidence" may be introduced. We do not consider this to be limited to newly discovered evidence. Nor can it be confined to the evidence of fresh witnesses. We adopt a more liberal view and allow the testimony of either new witnesses i. e. (those not examined in the Court below) or of witnesses examined below if their evidence shall be new and not a mere repetition of what was said and recorded below.

We come now to the points presented by this appeal on the evidence.

The defendant holds as lessee or otherwise certain parcels of land in Waialua, Oahu, upon which are several springs called Pahukii iki, Pahukii iki, Lehua and Kalia, and other springs not named. The water comes to the surface and makes something of a pond surrounding each spring. The water flows from one spring or pond to another and supplies water for many parcels or patches of land adjacent divided by banks or kaumuas, formerly cultivated in kalo but now mainly in rice. The water from Pahukii iki flows into the Kalia spring. From this largest pool or lake, the Kalia spring, there is an ancient ditch or auwai leading thence and passing along side of the Pahukii nui spring the auwai receives from it a supply of water through an opening in its banks. Further along the auwai receives another augmentation of its supply of water from the Lehua spring, after having passed through several kalo or rice patches. Thence the ditch is continued until it reaches the lands owned by the plaintiffs and supplies them with water. On the lower and makai side of this main auwai, i. e. between the auwai and the river are many patches formerly planted in kalo but which are now planted in rice by defendant.

We think it is well established by the testimony that the plaintiffs have used the water for a period much over twenty years distributing it among themselves according to well settled times of use. For instance, the plaintiff, Davis, has the water on his lands (which he got by deed from King Kaleohanonoha III in 1851.) for 88 hours every week. There is no controversy between the plaintiffs. They make common cause against the defendant who is the representative of a Chinese company engaged in the culture and complain that he has wrongfully diminished the supply of water accustomed to flow in the main auwai to their injury. That he has done this by placing two wooden troughs or drains under and across the main auwai externally for the purpose of draining the water from the rice land on the upper side of the auwai. The water that flows through one of these drains goes into the rice land of the defendant on the lower or river side of the auwai and there is testimony that much water thus finds its way to the river and is lost.

The plaintiffs also complain that the defendant takes the water from Pahukii iki to other lands of his by a rotary screw which thus prevents the water from flowing into the Kalia pond.

Another complaint of the plaintiffs is that the defendant has cut and trimmed the banks of the main auwai, so that whereas formerly its width averaged three feet it is now only a foot and a half and eight inches wide in places.

Many witnesses testify to the diminution of water by reason of defendant's acts, and Davis says the supply of water to the lands of the plaintiffs is reduced so that, whereas formerly a trough 6 inches broad by 6 inches high would not carry off all the water, now a trough 4 inches wide by 2 inches high is sufficient.

The plaintiffs contend that by the evidence the patches adjacent to the springs, now held by defendant are not entitled to water as of a right obtained by prescription. The evidence is that these patches when cultivated in kalo, were accustomed from ancient times to be filled with water, as they needed it, directly from the main auwai through openings made in the banks. When one patch was full the water was made to flow into the patch next below it until this was full, and when all were full the water would be stopped off from the main auwai by filling the cut or opening with sods or stones. The argument is made that as these patches had no regular days allotted in which they received their water supply, but took it as they needed it; and as some of the witnesses say "furtively," no right by prescription was thus acquired.

But a large number of these patches belonged to the konohiki, or general land owner in whose land some of these springs which supply the water are situated.

By the rules of ancient Hawaiian agriculture the konohiki patches would be entitled to water. And it is a general principle, and not disputed, that a land owner is entitled to the use of the water originating upon his land, subject only to the rights which others may acquire by prescription. As to the patches of land in the immediate proximity of the springs not owned by the konohiki, but granted as kuleanas, and now in possession of the defendant we are of the opinion that rights of water can be acquired for them by a sufficiently long and adverse open use of such water as may be required for the cultivation of the crop, though the water be not taken during stated periods of time. But the konohiki, or owner of the lands in which these springs are, can use as he pleases, whatever water from them has not been acquired by adverse use by others.

The plaintiffs contend that they are entitled by adverse possession, to the use of the auwai full of water leading from the springs. The defendant's counsel contend that "in regard to the water pumped from the defendant's lots above the ditch into either of his lots there, he had a right so to do, it being water arising from a spring upon his own land; and that by the same right they were authorized in drawing off the Pahukii water to other land of their own. The Pahukii land being lower than the auwai, it is certain that water could and can reach the auwai in no other way than by being allowed to collect on the Pahukii lots until it overflows the banks of the auwai, and also by its flowing, either as surface water, or by subterranean percolation from the Pahukii spring into the lower Kalia spring. That the plaintiffs have no right to such overflow, involving as it does the necessity of keeping their land in such a condition that the water would overflow its bounds, and no right to the accretion to Kalia spring water from surface water or by subterranean percolation from the Pahukii spring, citing the below mentioned authorities in support of the position that no legal right can be acquired to the continued use of water by subterranean percolation or from surface flowing:

Acton vs. Blundell, 12 M. & W. 324.
Chasemore vs. Richards, 7 H. L. 349.
Beach vs. Driscoll, 20 Conn. 553.
Swett vs. Cutts, 50 N. H. 439.
Waffle vs. N. Y. C. R. R., 58 Barb. 413.
Goodale vs. Tuttle, 29 N. Y. 466.
Bliss vs. Greely, 45 N. Y. 671.
Chase vs. Silverstone, 62 Me. 175.
Washburn on Easements, Sections VI, VII.

The principle collected from these authorities is thus stated by Washburn in his work on Easements p. 441. "It may be stated as a general principle of nearly universal application, that, while one proprietor of land may not stop or divert the waters of a stream flowing in a regular channel through it, so as to deprive a land owner whose estate lies upon the stream below that of the proprietor first mentioned, of the use of the same, or essentially impair or diminish the use thereof; if, without an intention to injure an adjacent owner, and while making use of his own land to any suitable and lawful use he cuts off, diverts or destroys the use of an underground spring or current of water which has no known or defined course, but has been accustomed to percolate and flow into the land of his neighbor, he is not thereby liable to any action for the diversion or stoppage of such water."

In the first case cited: *Acton vs. Blundell*, the Court say "there is a marked and substantial difference between the law as to the rights to enjoy an underground spring of water and that by which a water course, flowing on the surface is governed." Mr. Washburn (id. p. 445) says that: "among the considerations upon which this difference is based, is that the one being notorious, whoever buys or grants it knows what passes, while the other is secret and unknown at the time of purchase and sale, and may be in its nature constantly shifting. Nor can it ordinarily be ascertained what part of the supply comes from one's own land and what from that of another." The controlling circumstance is not whether the stream was above or below ground but whether it was or was not constituted and defined as a stream. If there is a natural spring, the water from which flows in a natural channel, it cannot be lawfully diverted by any one to the injury of riparian proprietors. If the channel or course underground is known, it cannot be interfered with." Id. 446.

In summing up the doctrine that rights cannot be acquired in subterranean, unknown percolating water, the learned author (id. 467 and 468) says: "Where, in addition to the foregoing authorities it is remembered that the common law idea of prescription implies a grant from an intelligent grantor of something with which he intends to part, to a grantee who intends to accept it, and that open adverse enjoyment in such cases is nothing more nor less than evidence of such a grant, it is difficult to see how the idea of such a grant having been made can be raised, when neither party could have known that the one was deriving anything from the other."

Applying these principles to the case at bar we find from the evidence that the water comes from these springs into the auwai in known and ascertained channels; they are pointed out by the witnesses and marked on the chart of the land in evidence.

The principles above stated refer to natural streams but they apply equally to artificial water courses as this auwai is. Such has uniformly been the decision of this Court.

A right by prescription can be acquired to the waters of a spring which came to the surface and make a pond and flow over or under the banks or through a cut in the same into an auwai constructed for the express purpose and conducting the water to lands where it may be used for irrigation.

It is, we think, proved in this case that the plaintiffs have acquired a right by prescription to the water flowing from the springs, in question into the auwai, after the kalo patches on either side of the auwai and adjacent thereto have received a supply of water sufficient for the cultivation of kalo.

We say that the defendant is to have water sufficient to cultivate his land in kalo because this is the gauge of the amount of water used by this land from ancient times and measures the amount of water which remains to the use of the plaintiffs.

It is urged upon us that it is essential to rice culture that the land be drained dry while the crop is maturing and while, after harvest, it is being plowed for the next planting and that this must be done twice a year. It is in evidence that a month is required at the end of each crop. This would necessitate the draining off of the land for two months of the year and as the drains run under the auwai all this water would be lost to the plaintiffs during this time, which would be one sixth of the whole time, during which the plaintiffs supply would be lessened.

The trough or drain made from one of defendants patches to another and lower one runs under and transversely to the auwai to the use of which the plaintiffs are entitled. This, by all the authorities, would be illegal, for the act here is not one done by the proprietor on his own land but is a trespass upon the auwai in which the plaintiffs have an easement. This easement goes to the extent that the auwai is not to be cut, narrowed or interfered with by defendant to the injury of plaintiffs.

We think the trough or drain in Kalia spring which takes the place and is the equivalent of the old waste gate is not objectionable and does not impair the plaintiffs rights.

The other drains under the auwai are a detriment to the plaintiffs and our judgment is that they must be removed and the holes through which they pass, stopped up. The use of the rotary pump must be discontinued. The banks of the auwai must be restored so that it will hold the water on the lower side and be sufficiently wide for a person to walk on it while going to and from obtaining the ditch or seeing to the supply of water.

S. R. Dole, for plaintiff. A. S. Hartwell, for defendant.

Honolulu, Nov. 3rd 1884.

Supreme Court of the Hawaiian Islands.—In Banco.

KAANAANA AND KAUNOU VS. J. L. SICKMAN.

Judd, C. J. McCully, J. Austin J.

Upon hearing the testimony offered and on examination of the record of the Water Commissioners, we are of the opinion that the decree of the said Commissioners, should be modified as claimed by the defendant, namely to the effect that the plaintiffs are entitled to one half the water of the Kitialua stream at night only, from the hours of five p.m. to five a.m.

Prentiss for defendant.

Honolulu, November 3rd, 1884.

Supreme Court of the Hawaiian Islands.—October Term, 1884. In Banco.

THE BOARD OF IMMIGRATION VS. BENITO TEIXEIRA DA ESTRELLA.

Judd C. J., McCully J., Austin J. Opinion of the Court by Judd C. J.

This case comes up by appeal of the plaintiff from a decision of Hon. C. F. Hart, Circuit Judge of the Island of Hawaii, in favor of defendant.

It appears by the record that the defendant signed a contract in writing on the 9th of May, 1881, at the Island of St. Michaels, wherein it is stated that he is desirous of emigrating to the Hawaiian Islands, there to be employed under the direction of the Board of Immigration of the Hawaiian Kingdom, and in consideration of facilitating (receiving) a passage to the Hawaiian Islands on board the bark Suffolk, and a further undertaking that the Board of Immigration will pay or cause to be paid to him certain wages, and other undertakings as to board, lodging, medical attendance, etc., etc., therein mentioned, the defendant agreed to "duly and faithfully perform such lawful and proper labor as he may be directed to perform, under the auspices of the Board of Immigration for and during the space of five years next succeeding the date of the commencement of such service after arrival in the Hawaiian Kingdom—it being always understood that he shall not be compelled to labor on Sunday or any holiday recognized by the Government, and that his services shall not be transferred without his consent," etc., etc.

It also appears that the defendant arrived at Honolulu, and was by a written agreement, executed August 23d, 1881, by the President of the Board of Immigration and the Star Mill Co., directed to labor for the said Star Mill Co. of Kohala, Hawaii.

In this agreement the Star Mill Co. agree to pay the wages, and to perform the other stipulations in favor of defendant originally promised, and agreed upon by the Board of Immigration. The Star Mill Co. agrees that the contract for the service of the said Benito Teixeira da Estrella shall not be transferred to any third party during the term of this contract without the consent of the said Board of Immigration, or its agent. The Board reserves the right, on the representation of the laborer to cancel the contract for any cause deemed by the Board to be sufficient and to refund a proportionate amount of the money advanced by the Star Mill Co. "But if the agreement shall be cancelled by a magistrate, for non-fulfillment, or violation of any of the conditions of the agreement on the part of the said Star Mill Co. then no refunding will take place."

The defendant went to Kohala under the direction above made, and has worked there for the Star Mill Co. for a portion of the stipulated time. On the 24th July, 1884, he left his work, and was brought up before the Police Justice of North Kohala, and by him tried and judgment rendered ordering him to return to the labor of the Star Mill Co. He thereupon appealed to Circuit Judge Hart. A power of Attorney from the President of the Board of Immigration to G. B. Ewart, manager of Star Mill was introduced, by which the Board authorizes G. B. Ewart to prosecute and defend in the name of the Star Mill Co., or in the name of the Board of Immigration, all cases and actions in which Portuguese and other laborers shall be a party, etc., and more especially those laborers under contracts, set over by the Board of Immigration to the Star Mill Co. The defendant claimed that he went to work at Kohala, for Mr. D. B. Vida, who, it seems was then the manager of the Star Mill Co. The Circuit Judge was unable to ascertain from the papers presented who, if the defendant was a bound servant, is his master, who, for a possible breach of contract, may be sued, fined and imprisoned. The point was also made that the contract was not acknowledged before a duly appointed agent, and that the contract was not stamped as required by the laws of Portugal.

We deem that the above full statement of the case is necessary in order to ascertain the legal status of the defendant.

Our statutes recognize two classes of labor contracts which may be enforced under our somewhat peculiar labor laws. One class is of contracts made in this country, and the other class is of those made in a foreign country, to be executed in this. The former class is authorized by Section 1417, which reads as follows:

"Any person who has attained the age of twenty years, may bind himself or herself, by written contract, to serve another in any art, trade, profession or other employment, for any term not exceeding five years." The second class is recognized by Section 1418 of the Civil Code which reads as follows:

"All engagements of service contracted in a foreign country, to be executed in this, unless the same be in contravention of the laws of this, shall be binding here; provided however that all such arrangements made for a longer period than ten years, shall be reduced to that limit, to count from the day of the arrival of the person bound, in this Kingdom."

The contract in this case is one made at St. Michaels (a foreign country) between the Board of Immigration and the defendant. It is recognized by Section 1418 above quoted. It is not necessary to the validity of this contract that it be acknowledged. The law requires "all contracts for service authorized by Section 1417 of the Civil Code" to be acknowledged: (Compiled Laws p. 457.) but these are domestic contracts only, and there is no statute requiring that contracts executed in a foreign country shall be acknowledged either in the country where made or upon arrival in this Kingdom.

An acknowledgment to a contract is for the purpose of facilitating the proof of its execution: such is the effect given to it by the law: Section 5 of the Act of 1872. (Compiled Laws p. 438.) In the absence of a statutory requirement to this effect, a contract would be perfectly good without an acknowledgment.

Under an Act authorizing the Minister of the Interior to appoint agents in each election district to take acknowledgments to labor contracts he could not appoint agents to act in a foreign country. If such were appointed his certificate would add nothing of value to the contract, and if the contract was invalid, such an acknowledgment would not make it valid.

But the fact that the defendant made and entered into this contract is not disputed by him. The copy before the Court was introduced by him and he has in pursuance of the contract received the benefit of a passage to this country and has worked under it for some years.

We pass the question suggested whether the contract is in conformity with the laws of Portugal, the dominion where it was made, with the remark that we have no evidence before us as to what the laws of that country are or what they require.

A foreign law relied upon as a defense must be proved like any other fact in the case.

Frith vs. Sprague, 14 Mass. 455.
Owen vs. Bogle, 15 Me. 147.
United States vs. Wiggins, 14 Peters 334.
Cutler vs. Wright, 22 N. Y. 472.
Murphy vs. Collins, 121 Mass. 6.

But if the law of Portugal applicable to such contracts had been proved in the case it would have to be established also that the want of formality in execution rendered the contract void and was not a defect which could be cured.

We wish also to guard against committing ourselves to the view that it is essential to the binding effect here of a foreign contract that it must fulfill the formalities required by the law of such country, the foreign law being proved. When such a case arises it will be considered.

The remaining question is if the defendant has by the papers in evidence a "master" responsible under the law, whom he can call to account for cruelty, mismanage or violation of any of the terms of the contract as set forth in the law: (Compiled Laws p. 462.)

It is evident that the Board of Immigration in this case considered that the contingency might arise of the contract being cancelled by a Magistrate for default of the Star Mill Co., for it is stipulated that if the contract shall be so cancelled no refunding will take place. We think that the Board of Immigration has so far substituted the Star Mill Co., in its own place as master over this servant, as to render the contract liable to be rescinded and the laborer discharged from all obligations to serve under it, whenever, in the opinion of a Magistrate having jurisdiction, cruelty, mismanage or violations of the terms of the contract shall be duly proven. We think that the judgment of the Magistrate in such a case should go further than to discharge the laborer from the service of the immediate employer and leave his original contract with the Board of Immigration still subsisting. The servant has a right to have his original contract annulled, for this is the contract which binds him.

If the cruelty or mismanage be done to the laborer, or the violation of the terms of the contract be occasioned, by an overseer, or other director of the laborer, and not the actual contracting master, the result would be the same as if done by the master himself and the Magistrate would be authorized to cancel the contract.

The Star Mill Co., like the majority of the plantation enterprises in this country is a corporation, but it has to work through managers, agents, officers and overseers and the laborer can rely on his contract being cancelled by a Magistrate in a case made, for the default or misdoings of these agents by whatever name they may be called.

But the law says that a "master" can be fined in a sum not less than five nor more than a hundred dollars and in default of payment be imprisoned at hard labor until the same is paid.

We think that any overseer or director of contract labor found guilty of cruelty or mismanage is so far forth a "master" in the meaning of this law and liable to the penalty above mentioned.

These provisions of the law are intended for the protection of the servant and they apply in terms to contracts made abroad and in this country to the contracts contemplated by Section 1417 and 1418 of the Civil Code.

Having thus found that the defendant is bound by a legal contract of service yet unfulfilled, the judgment of the Circuit Judge is reversed and the defendant is ordered to return to the service of the Star Mill Co.

W. R. Austin, for the Board of Immigration; W. R. Castle, for the Star Mill Co.

Honolulu, Nov. 1st 1884.

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