

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musgrove v. Chun Teong Toy, from the Supreme Court of the Colony of Victoria; delivered 18th March 1891.*

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Present :

THE LORD CHANCELLOR.

LORD HOBHOUSE.

LORD HERSCHELL.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

MR. SHAND (LORD SHAND).

[*Delivered by the Lord Chancellor.*]

This is an appeal from a judgment of the Supreme Court of Victoria in favour of the Respondent, a Chinese immigrant, the Plaintiff in an action against the Collector of Customs at Victoria, who was the Defendant in the action, and is now the Appellant.

By an order made in the action by consent the action was to be determined by the decision of the Full Court on the argument of the questions of law raised in the pleadings.

The question having been argued the majority of the Court gave judgment in favour of the Plaintiff.

By a further proceeding in the action the damages were assessed at 150*l.*, and from that judgment the present appeal was brought.

It is necessary first to ascertain what question is raised by the pleadings, and upon what state

of admitted facts the question so raised is to be determined.

The statement of claim sets out that the Defendant was the Collector of Customs within the meaning of the Chinese Act, 1881, alleges the arrival in Hobson's Bay of the Plaintiff on board a British ship, "Afghan," and in the fourth paragraph that the master of the ship "Afghan"—"offered to pay, and was always ready and willing to pay, to the Defendant as such Collector of Customs as aforesaid in respect of the Plaintiff, the sum of 10*l.*, as provided in Section 3 of the Chinese Act, 1881. Yet the Defendant refused to allow the Plaintiff to land in Victoria, and hindered and prevented the Plaintiff from landing in Victoria, and altogether refused and declined to receive the said sum of 10*l.*"

The allegation of the tender of the 10*l.* is somewhat ambiguously worded. It may mean that 10*l.* was tendered separately for the Plaintiff, which would seem to be its natural meaning; or it may mean that a gross sum was tendered for all the immigrants on board, including therefore the 10*l.* for the Plaintiff; but it can make no difference, for reasons to be presently stated, in which sense the allegation is to be understood.

With respect to the concluding allegation that the Defendant hindered and prevented the Plaintiff from landing, it seems to imply a duty in the Collector of Customs to receive the 10*l.* under the circumstances stated and described, and to allege as one of the consequences of a breach of that duty, that the Plaintiff was thereby prevented and hindered from landing. It certainly does not seem to suggest any other hindering and preventing than that which was involved in the refusal to receive the 10*l.*

The statement of defence was what would have been described under a former system of

pleading as a plea in confession and avoidance. And the demurrer admits every material allegation which is necessary for the determination of either of the separate defences which the statement of defence sets up. It states that the Plaintiff was a subject of the Emperor of China, and owed allegiance to him, and was not a British subject, and that whilst the Acts of the Parliament of Victoria mentioned in the statement of claim were in full force and unrepealed the Plaintiff was a Chinese immigrant within the meaning of the said Statutes, and as such immigrant had arrived at the port of Melbourne, in a certain British vessel called the "Afghan," which vessel had so arrived in the port with 268 Chinese immigrants on board, being 254 more Chinese immigrants than under the Statute such vessel might lawfully bring into the port of Melbourne. The Record therefore discloses these facts, that the Plaintiff was an alien Chinese; that he had arrived on board a vessel conveying immigrants exceeding the number which could lawfully be brought into port by that vessel; that the sum of 10% had not been paid to the Collector of Customs in respect of the Plaintiff; and that the master of the vessel had offered to pay, and was always ready and willing to pay that sum. The question is whether upon these facts the Plaintiff has shown that there was a breach of duty towards him committed by the Defendant, and that a legal right which he possessed has been infringed. Their Lordships will in the first instance consider the questions which have been raised with regard to the construction of the Code of Victorian Statutes, and their bearing upon the present case, although there is a broader question opened by the claim of the Plaintiff to which allusion will be made hereafter. It is not open to controversy that by virtue of the third section of

the Chinese Act of 1881 the Plaintiff had no legal right to land until the sum of 10*l.* had been paid for him, and the non-payment of that sum would *prima facie* be a complete answer to the complaint that he had been hindered and prevented from landing. The Plaintiff seeks to get rid of this difficulty by the allegation that he or the master of the vessel on his behalf tendered and was ready and willing to pay the 10*l.*, and that it was by the refusal of the Defendant to receive it that the payment provided for by the Statute was not made. But it is obvious that this will not aid him, unless he can establish that there was a legal obligation on the part of the Collector to receive the sum, and that, as the refusal to receive it constituted a breach of duty towards him, his right to maintain the action was thus made good. It appears to have been contended that the true construction of the third section of the Chinese Act, 1881, was that a license to land was intended to be given to any Chinese immigrant provided that he paid 10*l.* on landing. Their Lordships are wholly unable to concur in any such interpretation of the Code of Statutes regulating the admission of Chinese immigrants into the Colony. On the contrary, the manifest object of the Code was to prevent an excessive number of Chinese, or what the Legislature thought to be an excessive number of Chinese, landing in the Colony, and not merely to impose a tax on those who were desirous of entering it. Their Lordships think that a consideration of the several provisions of the Act of 1881 read as they must be together, renders it clear that this was so. The second section of the Act provides that the owner, master, or charterer of a vessel arriving with a greater number of immigrants than is allowed shall be liable on conviction to a penalty of 100*l.* for each immigrant so carried

in excess of the number permitted. The object of this legislation is obvious. It was to prevent the introduction into the Colony by means of one vessel of more than the limited number permitted, and not to license it on payment of a penalty. It is not because the unlawfulness of an Act is visited by a pecuniary penalty that the payment of that penalty makes it lawful.

The third section of the Act was part of the same scheme, and evidently designed with the same view as the second section. It not merely prohibits any Chinese immigrant landing until the sum of 10*l.* has been paid in respect of him, but it enacts that before making any entry at the Customs the master of the vessel by which the immigrant arrives shall pay to the Collector of Customs the sum of 10*l.* "for every such immigrant," and that no entry is to be deemed to have any legal effect until such payment has been made. It is clear, in their Lordships' opinion, that where the master of a vessel has committed an offence by bringing a greater number of Chinese into a port of the Colony than the Statute allows, he can have no right to require the Collector of Customs to receive payment in respect of such immigrants, and thus to further the purpose for which the unlawful act was committed, and that there can be no legal duty on the part of the Collector to receive any payment tendered him in respect of such immigrants. If this be so the case of the Plaintiff manifestly fails, for as has been pointed out the Statute prohibits his landing before the payment of the specified sum, and he could only get rid of this difficulty by showing that the refusal to receive payment was unlawful. It was urged on behalf of the Plaintiff that the payment of 10*l.* provided for is made in each case on behalf of the immigrant, and that whatever may be the position of a master who has brought himself within the penal provisions of the second section of the Statute, each immigrant is entitled to

require that the Collector shall receive the payment made by or for him. Their Lordships are unable to adopt this construction of the Statute, or to hold that its effect is to confer any such right as that suggested, where the act of bringing the intending immigrants into port by the vessel is a contravention of the law.

Their Lordships have so far dealt with the case, having in view only the enactments of the Legislature of Victoria, and it appears to them manifest that upon the true construction of these enactments no cause of action is disclosed on the Record. This is sufficient to determine the appeal against the Plaintiff, but their Lordships would observe that the facts appearing on the Record raise, quite apart from the Statutes referred to, a grave question as to the Plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the Executive Government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorized by his own Colonial Government, whether the Colonial Government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the Colonial Government if properly communicated to it, and whether the Crown has the right without Parliamentary

authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their Lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action. Their Lordships, therefore, do not think it would be right on the present appeal to express any opinion upon the question which was elaborately discussed in the very learned judgments delivered in the Court below, viz., what rights the Executive Government of Victoria has, under the constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were represented, and which may never become of practical importance, and their Lordships feel bound, upon the grounds which they have indicated, to abstain from pronouncing upon them on the present occasion. For the reasons which have been submitted, and which are indeed involved in the very able judgment of Mr. Justice Kerferd, with which their Lordships gather that the Chief Justice concurred, their Lordships will humbly recommend Her Majesty that the judgment of the Court below be reversed, and judgment entered for the Defendant in the terms of the consent order. There will be no costs of this Appeal.

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