JUDGMENTS

OF THE

SUPREME COURT OF FIJI.

HUNT *v.* GORDON.

[Civil Jurisdiction (Gorrie, C.J.) October 22, 1880.]

Western Pacific Order in Council, 1877, ss. 7, 9, 10, 13, 25,—Western Pacific Order in Council, 1879—issue of Prohibition Order by High Commissioner for the Western Pacific—whether a judicial act—whether actionable in tort.

The defendant, as High Commissioner for the Western Pacific, had issued a prohibition order against the plaintiff under Art. 25 of the Western Pacific Order in Council, 1877,[1] debarring him from remaining in Samoa. An action for damages was brought in the Supreme Court of Fiji against the defendant for having instituted these proceedings maliciously and without proper evidence.

HELD.—No action will lie against the High Commissioner of the Western Pacific for anything done by him honestly and without malice under the powers vested in him by such Order, the same protection being accorded to him as to a judicial officer under similar circumstances.

[**EDITORIAL NOTE.**—The provisions of the Western Pacific Orders in Council 1877 and 1879 (Rep.) referred to in this judgment are substantially the same as those in the Pacific Order in Council, 1893, in so far as they are relevant to the point here decided. Reference to the relevant Articles of the Pacific Order in Council 1893 are given as footnotes. Portion of this judgment dealing with a question of service on Sunday has been omitted (as indicated in the report) as being of no importance.]

Cases referred to: —

(1) *Musgrave v. Pulido* [1879] 5 A.C. 102 ; 49 L.J.P.C. 20 ; 41 L.T. 629 ; 17 Dig. 418.

(2) *Kemp v. Neville* [1861] 31 L.J.C.P. 158 ; 4 L.T. 640 ; 142 E.R. 556 ; 16 Dig. 198.

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[1] *Repealed. Vide Art.* 111 (10) *of the Pacific Order in Council,* 1893.

ACTION for damages for malicious proceedings.

The facts and arguments in the case sufficiently appear from the judgment.

J. H. Garrick and *F. P. Winter* for the plaintiff.

The Acting Attorney-General, *P. S. Solomon, Q.C.* for the defendant.

GORRIE, C.J.—This is a case in which the plaintiff represents himself as Chief Secretary and Minister of Lands to Malietoa, the so-called King of Samoa, and that he is presently residing in Levuka. The action is laid against Her Majesty's High Commissioner for the Western Pacific, and damages are claimed by the Plaintiff for an alleged wrongful act of the defendant.

The alleged wrong is said to have arisen from a writ of prohibition having been issued by the High Commissioner against the plaintiff under s. 25 of the Western Pacific Order in Council, 1877.[1] A plea, apparently challenging the jurisdiction of the Court, is raised by the defendant under paragraph 7 of his statement of defence ; but after explanation by the learned counsel and in view of the fact that by the action no appeal (which is barred by the Order in Council) is attempted against the writ of prohibition, although damages are sought because of its issue, this plea to the jurisdiction may be regarded as abandoned and requiring no formal judgment thereupon.

There was no attempt to question the jurisdiction of the Court, as in the recent case of *Musgrave v. Pulido* and, indeed, after the judgment in that case, it would have been hopeless to do so. But I am afraid the effect of that judgment has been misunderstood in some quarters. It merely affirmed the doctrine that the governor of a colony, like any other subject, may be impleaded in the courts of the colony, and the judgment of the court below, which was affirmed, was simply setting aside the demurrer which raised the question of jurisdiction, and ordering the defendant (the Governor of Jamaica) to answer further to the plaintiff's action. Here the defendant, who is not sued as Governor but as High Commissioner, does not challenge the jurisdiction on any similar ground, but pleads a general and also a special plea which will be found set forth in the eighth and ninth paragraphs of the statement of defence, viz., that he is not guilty by statute and that he ought not to be compelled to answer to the action,—which I take to mean to answer further to the action,—because what he did was done as High Commissioner, and that he is entitled to the privileges and exemptions appertaining to such office ; and that the acts complained of were done by him in exercise of the powers expressly conferred on him by the Order in Council. The latter plea, in fact, is covered by the former ; and under the two pleas the defendant has contended in effect that what he did was done as a judicial act by the officer designated for the purpose by the Order in Council, or at all events that if the act was not a judicial act it was an executive act which the Order in Council, issued in pursuant of certain Acts of Parliament required him to perform, and that therefore he cannot be called upon to answer further or be held liable in damages.

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[1] *Repealed Art.* III (10) *of the Pacific Order in Council,* 1893.

Before the argument was taken in support of this contention the plaintiff's counsel opened his case, and, as it was necessary to understand clearly what such case really was before the Court could determine whether the pleas in defence were sufficient without further inquiry, I found that the allegations of malice and without probable cause, contained in the sixteenth paragraph of the statement of claim, were not the gist of the action as maintained at the bar, but that what the plaintiff contended was that the evidence upon which the defendant acted in issuing the writ of prohibition was not proper evidence or any proof to which the word evidence could be properly applied, and, therefore, that in issuing the writ of prohibition upon such a description of evidence the defendant had committed the tort which laid him open to a claim for damages. In supporting this contention the plaintiff's counsel referred particularly to the evidence of one Coe—whom he described as a person unworthy of belief—and read or referred to a portion of his affidavit which showed that he represented the plaintiff as a person who had advised, or was advising, the Samoan King to make war.

The plaintiff also maintained, as set forth in the sixteenth paragraph of the statement of claim, that the act of the defendant was not a judicial act.

(The judgment proceeds to dispose of a contention by the defendant that service of the writ of prohibition on a Sunday was illegal).

All the material facts alleged by the plaintiff which raised the question which the plaintiff's counsel explained to be the gist of his action—viz., that the evidence taken before the issue of the writ of prohibition was not evidence in the proper meaning of the term—are admitted by the defendant. The allegations are contained in the third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of the statement of claim. The qualification alleged by the defendant in regard to the statement in the sixth paragraph that he informed the plaintiff of the evidence on oath he had obtained in support of the charges made against the plaintiff was in effect admitted by the plaintiff's counsel at the Bar, who contended, in reference particularly to the evidence of one witness, that it was not worthy of belief. The allegations set forth in the twelfth, thirteenth, fourteenth, and fifteenth paragraphs of the statement of claim are denied by the defendant, and are objected to by him as surplusage and bad in form. They were no doubt intended to lead up to the charge of malice, contained in the sixteenth paragraph, which the plaintiff's counsel has eliminated from the case, except so far as malice might be inferred from the granting of the order upon insufficient evidence. As to the allegation contained in that paragraph that the High Commissioner in issuing the writ of prohibition was not in the exercise of any judicial duty we shall presently inquire.

The ground is thus cleared and the facts on record for the consideration of the plea put forth by the defendant, in the eighth and ninth paragraphs of the statement of defence, that what he did was done under the Order in Council and that he is privileged and protected when thus acting and cannot be sued in damages for acts so done. Now although the High Commissioner has under the Order in Council—especially the amended Order of 1879—power which may more properly be regarded as executive than judicial, yet the prime object of the Order

in Council and the Acts of Parliament which authorized it was to provide for a jurisdiction over British subjects in the Western Pacific in the event of offences being committed by them.[1]

The office of High Commissioner is created and constituted under s. 7[2] of the Order ; of a Judicial Commissioner under s. 9[2]; and of Deputy Commissioners under s. 10[2]; while under s. 13[2] it is provided that the High Commissioner, the Judicial Commissioners, and Deputy Commissioners form the members of the High Commissioner's Court. In the ordinary cases, therefore, of the exercise of the powers conferred by the Order in Council these officers are judicial officers having the privilege and protection of all judicial authorities in the exercise of their functions, which is that they cannot be sued for an adjudication, according to the best of their judgment on the matter, within their jurisdiction ; and that a matter of fact so adjudicated by them cannot be put in issue in an action against them.

But it has been contended by the plaintiff, both in his statement of claim and in argument in answer to the learned counsel for the defendant, that the issue of a writ of prohibition under s. 25 is not a judicial act, as it expressly provides that it is to be done by the High Commissioner under his hand and official seal, and not under the seal of the Court. There can be no doubt, however, that a person who is not even a judicial functionary may be called upon to perform a judicial act, and that in doing so he will be as much protected as any other judicial functionary—and this is well illustrated in the case of *Kemp v. Neville* in 1861, where the functionary called upon to perform a judicial duty was a Vice-Chancellor of the University of Cambridge, and where in the performance of that duty he was found entitled to the protection of all judicial officers.

It does not follow, therefore, that because the High Commissioner is called upon under s. 25 to perform this duty in his individual capacity, and not when sitting as a Court, that it is not a judicial act. Let us see what is the nature of the act in itself. First of all he is required to take evidence on oath. The words are,—

> "Where it is shown by evidence on oath[3] to the satisfaction of the High Commissoner that "any British subject is disaffected to Her Majesty's Government . . . or is otherwise "dangerous to the peace and good order of the Western Pacific Islands, the High Commissioner "may, if he thinks fit, by order under his hand and official seal, prohibit that person," etc.

To take evidence on oath is essentially a judicial function, and the object of this writ of prohibition—the preservation of the peace and good order of the Western Pacific—is no less than that which is usually laid upon judicial or magisterial authorities. Again, by sub-s. 2 of s. 25, the refusal to obey the writ of prohibition is to be visited by legal punishment, and even where the offender may not have been convicted of the offence of refusing to obey the prohibition, the High Commissioner has power to remove him in custody to some place in the Western

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[1] *By the Pacific Order in Council, 1893 this jurisdiction is enlarged to include foreigners and natives who are not British subjects where the matter giving rise to the proceedings took place on a British vessel, in British territory or in a British Protectorate and where the person over whom jurisdiction is exercised is found on a British Vessel, in British territory or in a British Protectorate.*

[2] *Vide respectively Articles 7, 8, 9, 14, of the Pacific Order in Council, 1893.*

[3] *CP. Art. 111 (10) of the Pacific Order in Council, 1893: "Where it is shown by information on oath . . ."*

Pacific Islands beyond the limits specified in the order. This is a power to punish following upon a conclusion arrived at after taking evidence on oath. Then again it is provided by sub-s. 3 that an appeal shall not lie against an order of prohibition or removal. This, the learned counsel for the plaintiff very properly contended, meant—when taken in connexion with sub-s. 5—providing for a report to the Secretary of State—that the act was truly a political act, and the responsibility laid upon the High Commissioner as a political officer.

I lean to the opinion, however, that the shutting out of the right of appeal rather shows that the issuing of the order of prohibition was a judicial act, but one which its nature required to be made final, as any provisions permitting of litigation in regard to it would destroy its efficacy as a measure for the preservation of peace. I am certainly strengthened in my view that the issuing of the order of prohibition is a judicial act by finding the form of the writ of prohibition among the judicial forms of procedure (No. 33)[1] provided in the Appendix to the Order in Council. Now if this be so, no allegations such as those made by the plaintiff that the evidence on oath taken by the defendant could not properly be called evidence would form a ground of action. Whether the evidence was such as another court would regard as good evidence, or whether any court or other functionary would have come to another conclusion than the High Commissioner upon the evidence, cannot be made a ground of any claim of damages against the functionary who rightly or wrongly did come to a decision upon the evidence before him. And the question of fact whether the plaintiff is or is not a person dangerous to the peace of the Western Pacific cannot be put in issue against him in such an action as this. The Order in Council itself, indeed, as if foreseeing the contention now raised has provided a definition of evidence which would of itself shut the door on the plaintiff even if the rules of law on such subject were not well established. Under s. 4[2] the word " proved " means shown by evidence on oath in the form of affidavit, or other form, to the satisfaction of the Court, or of the member or officer thereof acting or having jurisdiction in the matter. The word " evidence " thereof means what is proved on oath to the satisfaction of the Court or officer, and that is exactly what is stated in the writ of prohibition which is embodied by the plaintiff in his statement of claim. It commences : " Whereas it has been shown by evidence on oath to my satisfaction . . ."

I am so satisfied that the views I have above enunciated afford the true solution of this question, that it is the less necessary to dwell at length upon the alternative plea of the defendant that even if the act complained of had not been a judicial act, as it was done in obedience to the duty laid upon the High Commissioner by the Order in Council, no action can lie, for no tort can be alleged where a simple legal duty has been performed. I am quite clear that no mistake in the appreciation of evidence—which is what the learned counsel represented as the gist of his case—would warrant an action of damages as for a tort against even a non-judicial officer, and that the pleas pleaded by the High Commissioner would be a sufficient answer to any such action.

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[1] (*No. C. 17B in the Appendix to the Pacific Order in Council*, 1893.)
[2] *Vide Art. 3 of the Pacific Order in Council*, 1893.

If any malice is alleged in such cases, either against a person performing a judicial act or a person performing in an official capacity a legal duty, it must, I apprehend, be not mere inferential malice to be deduced from the defective mode in which the duty may have been alleged to have been performed, but personal malice which must be directly proved. In these circumstances I hold that there is not in the case any tort set forth which could warrant further inquiry in this case, and that the defendant's pleas upon the admitted facts are a full and complete answer to the case as put before the Court, and that the action must be accordingly dismissed. I allow costs ; and, as the plaintiff represents himself as an official of the King of Samoa and only temporarily resident in Levuka, I think it right, in this case, that the attorney should be looked to for the amount in the first instance, leaving him to recover the same from his client. I allow £151 15s. 0d. in name of costs.

Judgment for defendant with costs.

BRODZIAK AND COMPANY *ats.* RECEIVER GENERAL.

[Appellate Jurisdiction (H. S. Berkeley Acting C.J.) June 14, 1887.]

Customs Regulation Ordinance 1881 *ss.* 77, 100—*Forfeiture of dutiable goods—proceedings taken for the forfeiture of dutiable goods under s.* 77 *of the Customs Regulation Ordinance* 1881,—*goods ordered by magistrate to be forfeited—whether magistrate has a discretion as to forfeiture.*

An employee of the appellant firm had passed entries for certain dutiable goods at the Customs, but had not included in those entries certain other goods contained in the same packages, though the invoice of the goods so omitted was presented at the Customs together with the invoices of the goods upon which duty was then paid. The magistrate held that he had no option save to order forfeiture of the goods.

HELD.—The Magistrate was not bound to order the forfeiture, but that he had a discretion given to him under the Customs Regulation Ordinance, 1881, s. 100, to dismiss the case if he thought that no intention to defraud had been shown.

[**EDITORIAL NOTE.**—S. 100 of the Ordinance of 1881 was as follows :—

"When any information shall have been laid before any Stipendiary Magistrate for the "forfeiture of any goods . . . or of any article whatsoever seized under this Ordinance "such Stipendiary Magistrate shall issue his summons to the person or persons owning or "claiming such goods . . . or other article to appear in support of his claim to the same "and upon such appearance or in default after due proof of the service of the summons a "reasonable time before the hearing the said Stipendiary Magistrate may proceed to inquire into "the matter and shall condemn such goods . . . or other article as aforesaid or make such "order as the circumstances require . . ." *vide* s. 147 of the Customs Ordinance (Cap. 147) Revised Edition Vol. II, p. 1540.